

# **ATTACHMENT 9**

1 UNITED STATES DISTRICT COURT  
2 NORTHERN DISTRICT OF CALIFORNIA  
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5 IN RE: CATHODE RAY TUBE )  
(CRT) ANTITRUST LITIGATION )  
6

) No. 3:07-cv-05944-SC  
) MDL No. 1917

7 This Document Relates to: )  
)  
8 ALL ACTIONS )  
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15 ORAL ARGUMENT HEARING  
16 San Francisco, California  
17 Tuesday, January 5, 2016  
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23 Reported by:  
SUZANNE F. BOSCHETTI  
CSR No. 5111  
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<p style="text-align: right;">Page 2</p> <p>1 UNITED STATES DISTRICT COURT 2 NORTHERN DISTRICT OF CALIFORNIA 3 4 _____ 5 ) 6 IN RE: CATHODE RAY TUBE ) 7 (CRT) ANTITRUST LITIGATION ) 8 _____) No. 3:07-cv-05944-SC 9 ) MDL No. 1917 10 This Document Relates to: ) 11 ) 12 ALL ACTIONS ) 13 _____) 14 15 ORAL ARGUMENT HEARING held before Special 16 Master Martin Quinn, at JAMS, 2 Embarcadero 17 Center, Suite 1500, San Francisco, California, 18 beginning at 9:55 a.m. and ending at 1:17 p.m., 19 on Tuesday, January 5, 2015, before SUZANNE F. 20 BOSCHETTI, Certified Shorthand Reporter No. 21 5111. 22 23 24 25</p>	<p style="text-align: right;">Page 4</p> <p>1 APPEARANCES (Continued): 2 3 FINE, KAPLAN AND BLACK, R.P.C. 4 BY: MATTHEW DUNCAN, ESQ. 5 BY: DONALD L. PERELMAN, ESQ. 6 1 South Broad Street, 23rd Floor 7 Philadelphia, Pennsylvania 19107 8 (215) 567-6565 9 mduncan@finekaplan.com 10 dperelman@finekaplan.com 11 12 FREEDMAN BOYD HOLLANDER GOLDBERG URIAS &amp; WARD P.A. 13 BY: JOSEPH GOLDBERG, ESQ. 14 20 First Plaza, Suite 700 15 Albuquerque, New Mexico 87102 16 (505) 244-7520 17 jg@fbdlaw.com 18 19 KIRBY McINERNEY LLP 20 BY: ROBERT J. GRALEWSKI, JR., ESQ. 21 600 B Street, Suite 1900 22 San Diego, California 92101 23 (619) 398-4340 24 bgralewski@kmlp.com 25</p>
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<p style="text-align: right;">Page 7</p> <p>1 APPEARANCES (Continued):</p> <p>2</p> <p>3 For Objecting IPPs:</p> <p>4 COOPER &amp; KIRKHAM, P.C.</p> <p>5 BY: JOSEF COOPER, ESQ.</p> <p>6 BY: TRACY KIRKHAM, ESQ.</p> <p>7 BY: JOHN D. BOGDANOV, ESQ.</p> <p>8 357 Tehama Street, 2nd Floor</p> <p>9 San Francisco, California 94103</p> <p>10 (415) 788-3030</p> <p>11 jdc@coopkirk.com</p> <p>12 trk@coopkirk.com</p> <p>13</p> <p>14 LAW OFFICES OF FRANCIS O. SCARPULLA</p> <p>15 BY: FRANCIS O. SCARPULLA, ESQ.</p> <p>16 BY: PATRICK CLAYTON, ESQ.</p> <p>17 456 Montgomery Street, 17th Floor</p> <p>18 San Francisco California 94104</p> <p>19 (415) 788-7210</p> <p>20 fos@scarpullalaw.com</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">Page 9</p> <p>1 APPEARANCES (Continued):</p> <p>2</p> <p>3 For Objectors John Finn and Laura Fortman:</p> <p>4 THE KRESS LAW FIRM LLC</p> <p>5 BY: JOHN KRESS, ESQ. (By telephone)</p> <p>6 4247 South Grand Boulevard</p> <p>7 St. Louis, Missouri 63111</p> <p>8 (314) 631-3883</p> <p>9 jckress@thekresslawfirm.com</p> <p>10</p> <p>11 STEVE A. MILLER, ATTORNEY AT LAW (By telephone)</p> <p>12 1625 Larimer St., No. 2905</p> <p>13 Denver, CO 80202-1539</p> <p>14 sampco1@gmail.com</p> <p>15</p> <p>16 For Objector Sean Hull:</p> <p>17 BANDAS LAW FIRM, P.C.</p> <p>18 BY: CHRISTOPHER A. BANDAS, ESQ. (By telephone)</p> <p>19 500 N. Shoreline Boulevard, Suite 1020</p> <p>20 Corpus Christi, Texas 78401</p> <p>21 (361) 698-5200</p> <p>22 cbandas@bandaslawfirm.com</p> <p>23</p> <p>24</p> <p>25</p>

<p style="text-align: right;">Page 10</p> <p>1 APPEARANCES (Continued):</p> <p>2 For Hitachi Defendants:</p> <p>3 KIRKLAND &amp; ELLIS LLP</p> <p>4 BY: ELIOT A. ADELSON, ESQ.</p> <p>5 555 California Street</p> <p>6 San Francisco California 94104</p> <p>7 (415) 439-1313</p> <p>8 eadelson@kirkland.com</p> <p>9</p> <p>10 For Samsung SDI Defendants:</p> <p>11 SHEPPARD MULLIN RICHTER &amp; HAMPTON LLP</p> <p>12 BY: MICHAEL W. SCARBOROUGH, ESQ.</p> <p>13 Four Embarcadero Center, 17th Floor</p> <p>14 San Francisco California 94111-4109</p> <p>15 (415) 434-9100</p> <p>16 mscarborough@sheppardmullin.com</p> <p>17</p> <p>18 For Philips Defendants:</p> <p>19 BAKER BOTTS LLP</p> <p>20 BY: ERIK T. KOONS, ESQ.</p> <p>21 BY: JOHN TALADAY, ESQ. (By telephone)</p> <p>22 1299 Pennsylvania Avenue, NW</p> <p>23 Washington, D.C. 40004-2400</p> <p>24 erik.koons@bakerbotts.com</p> <p>25 john.taladay@bakerbotts.com</p>	<p style="text-align: right;">Page 12</p> <p>1 APPEARANCES (Continued):</p> <p>2</p> <p>3 For Chunghwa Picture Tube Defendants:</p> <p>4 GIBSON DUNN &amp; CRUTCHER LLP</p> <p>5 BY: RACHEL S. BRASS, ESQ. (By telephone)</p> <p>6 555 Mission Street</p> <p>7 San Francisco, California 94105--0921</p> <p>8 (415) 393-8293</p> <p>9 rbrass@gibsondunn.com</p> <p>10</p> <p>11 For the State of California:</p> <p>12 DEPARTMENT OF JUSTICE</p> <p>13 OFFICE OF THE ATTORNEY GENERAL</p> <p>14 BY: EMILIO VARANINI, ESQ.</p> <p>15 455 Golden Gate Avenue, Suite 11000</p> <p>16 San Francisco California 94102-7002</p> <p>17 (415) 703-5908</p> <p>18 emilio.varanini@doj.ca.gov</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
<p style="text-align: right;">Page 11</p> <p>1 APPEARANCES (Continued):</p> <p>2 For Panasonic Defendants:</p> <p>3 WINSTON &amp; STRAWN LLP</p> <p>4 BY: MARTIN C. GEAGAN, ESQ.</p> <p>5 200 Park Avenue</p> <p>6 New York, New York 10166</p> <p>7 (212) 294-4615</p> <p>8 mgeagan@winston.com</p> <p>9</p> <p>10 For Thomson Defendants:</p> <p>11 FAEGRE BAKER DANIELS LLP</p> <p>12 BY: KATHY L. OSBORN, ESQ. (By telephone)</p> <p>13 300 N. Meridian Street, Suite 2700</p> <p>14 Indianapolis, Indiana 46204</p> <p>15 (317) 237-8562</p> <p>16 kathy.osborn@faegrebd.com</p> <p>17</p> <p>18 For Toshiba Defendants:</p> <p>19 WHITE &amp; CASE LLP</p> <p>20 BY: CHRISTOPHER M. CURRAN, ESQ. (By telephone)</p> <p>21 BY: J. MARK GIDLEY, ESQ. (By telephone)</p> <p>22 701 Thirteenth Street, NW</p> <p>23 Washington D.C. 20005-3807</p> <p>24 (202) 626-3609</p> <p>25 ccurran@whitecase.com</p>	<p style="text-align: right;">Page 13</p> <p>1 APPEARANCES (Continued):</p> <p>2</p> <p>3 For Direct Purchaser Plaintiffs Class:</p> <p>4 SAVERI &amp; SAVERI, INC.</p> <p>5 BY: GUIDO SAVERI, ESQ.</p> <p>6 706 Sansome Street</p> <p>7 San Francisco, California 94111</p> <p>8 (415) 217-6810</p> <p>9 guido@saveri.com</p> <p>10</p> <p>11 Also Present:</p> <p>12 MARLA COHEN, ESQ.: Research Attorney</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>

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<p style="text-align: right;">Page 14</p> <p>1 San Francisco, California; Tuesday, January 5, 2016</p> <p>2 10:09 a.m.</p> <p>3 ---o0o---</p> <p>4</p> <p>5 SPECIAL MASTER: Good morning. I'd like you to</p> <p>6 identify yourselves for my benefit if not the court</p> <p>7 reporter's. That would be good.</p> <p>8 MR. ALIOTO: Good morning. Mario Alioto, lead</p> <p>9 counsel for the indirect purchasers.</p> <p>10 SPECIAL MASTER: Okay. And everyone has to</p> <p>11 speak up, you know, without yelling at each other. But</p> <p>12 we have to almost yell at each other because we not only</p> <p>13 have to be sure Ms. Cohen and I hear, but the people on</p> <p>14 the phone have to hear.</p> <p>15 MS. CAPURRO: Good morning, Your Honor. Lauren</p> <p>16 Capurro for the indirect purchaser plaintiffs.</p> <p>17 MR. DUNCAN: Good morning, Your Honor. Matthew</p> <p>18 Duncan from Fine, Kaplan and Black in Philadelphia for</p> <p>19 the IPPs.</p> <p>20 MR. GOLDBERG: Good morning, Mr. Quinn. My</p> <p>21 name is Joe Goldberg from Freedman Boyd Hollander</p> <p>22 Goldberg Urias &amp; Ward in Albuquerque, New Mexico, for</p> <p>23 the IPPs.</p> <p>24 SPECIAL MASTER: I was just there.</p> <p>25 MR. GOLDBERG: So was I.</p>	<p style="text-align: right;">Page 16</p> <p>1 MS. MOORE: Theresa Moore for objectors</p> <p>2 Rockhurst University, Garavanian and Talewsky.</p> <p>3 MR. VARANINI: Emilio Varanini on behalf of the</p> <p>4 California Attorney General's Office.</p> <p>5 MR. SAVERI: Guido Saveri. I'm the lead</p> <p>6 counsel for the direct purchasers. I do not intend to</p> <p>7 participate. I'm here just as an observer, but I see a</p> <p>8 lot of my friends here that I haven't seen for years.</p> <p>9 Mr. Goldberg and the whole crowd, it's nice to see you.</p> <p>10 Nice to see you again. You have your problems. The</p> <p>11 direct purchase plaintiffs, as you know, are all</p> <p>12 finished, and we're here to see what's going on.</p> <p>13 SPECIAL MASTER: Thank you.</p> <p>14 MR. SAVERI: Nice to see you. I'd like to see</p> <p>15 several of you later and renew old acquaintances.</p> <p>16 SPECIAL MASTER: We appreciate the support.</p> <p>17 MS. KERN: Sylvie Kern for the indirect</p> <p>18 purchaser plaintiffs.</p> <p>19 MR. GRALEWSKI: Bob Gralewski, Kirby McInerney,</p> <p>20 on behalf of the indirect purchaser plaintiffs.</p> <p>21 MR. MICHELETTI: Chris Micheletti with Zelle on</p> <p>22 behalf of the IPPs.</p> <p>23 MR. PERELMAN: Don Perelman, Fine, Kaplan and</p> <p>24 Black, for the IPPs.</p> <p>25 MR. BOGDANOV: John Bogdanov with Cooper &amp;</p>
<p style="text-align: right;">Page 15</p> <p>1 MS. KIRKHAM: Good morning. Tracy Kirkham of</p> <p>2 Cooper &amp; Kirkham on behalf of the objecting indirect</p> <p>3 purchaser plaintiffs.</p> <p>4 MR. COOPER: Josef Cooper, the second half of</p> <p>5 the firm.</p> <p>6 MR. SCARPULLA: Francis Scarpulla, Your Honor,</p> <p>7 from the Law Offices of Francis Scarpulla in</p> <p>8 San Francisco for the same objectors.</p> <p>9 MR. BONSIGNORE: Robert Bonsignore on behalf of</p> <p>10 the excluded plaintiffs. Excuse me for yelling.</p> <p>11 MR. ADELSON: Eliot Adelson of Kirkland &amp; Ellis</p> <p>12 for Hitachi.</p> <p>13 MR. SCARBOROUGH: Michael Scarborough of</p> <p>14 Shepard Mullin for the Samsung SDI defendants.</p> <p>15 MR. KOONS: Erik Koons, Baker Botts, on behalf</p> <p>16 of Philips defendants.</p> <p>17 MR. GEAGAN: Martin Geagan, Winston &amp; Strawn,</p> <p>18 on behalf of the Panasonic defendants.</p> <p>19 MR. CORBITT: Good morning, Your Honor. Craig</p> <p>20 Corbitt for the IPPs.</p> <p>21 MR. CIHLAR: Nathan Cihlar from Straus &amp; Boies</p> <p>22 for the IPPs.</p> <p>23 MR. NOVAK: Paul Novak of Milberg for the IPPs.</p> <p>24 MR. ST. JOHN: Joseph St. John for objector</p> <p>25 Douglas St. John.</p>	<p style="text-align: right;">Page 17</p> <p>1 Kirkham, objecting IPPs.</p> <p>2 MR. CLAYTON: And Patrick Clayton from the Law</p> <p>3 Offices of Francis O. Scarpulla for the objecting IPPs.</p> <p>4 SPECIAL MASTER: All right. And on the phone,</p> <p>5 if you could announce yourselves.</p> <p>6 MR. BANDAS: Chris Bandas for objector Sean</p> <p>7 Hull.</p> <p>8 MS. OSBORN: This is Kathy Osborn for</p> <p>9 defendants, the Thomson defendants.</p> <p>10 MS. BRASS: This is Rachel Brass for the</p> <p>11 Chunghwa Picture Tube defendants.</p> <p>12 SPECIAL MASTER: Thank you.</p> <p>13 MR. HOAG: You have Frank Hogue and Chris</p> <p>14 Curran from White &amp; Case on behalf of the Toshiba</p> <p>15 defendants.</p> <p>16 MR. TALADAY: John Taladay from Baker Botts on</p> <p>17 behalf of the Philips defendants.</p> <p>18 MR. KRESS: John Kress on behalf of John Finn</p> <p>19 and Laura Fortman.</p> <p>20 SPECIAL MASTER: Mr. Kress, who are you</p> <p>21 representing?</p> <p>22 MR. KRESS: John Finn and Laura Fortman.</p> <p>23 SPECIAL MASTER: All right.</p> <p>24 MR. BIRKHAUSER: One more, Your Honor. Dan</p> <p>25 Birkhauser of Bramson, Plutzik, Mahler &amp; Birkhauser on</p>

<p style="text-align: right;">Page 18</p> <p>1 behalf of the IPPs.</p> <p>2 MS. ANDERSON: And Jennie Lee Anderson of</p> <p>3 Andrus Anderson on behalf of IPPs.</p> <p>4 MR. MILLER: And Steve Miller, co-counsel with</p> <p>5 John Kress on behalf of Finn and Fortman.</p> <p>6 SPECIAL MASTER: All right. Anyone else on the</p> <p>7 phone who has not announced himself or herself?</p> <p>8 All right. Here comes the email address from</p> <p>9 the court reporter.</p> <p>10 (Reporter complies.)</p> <p>11 SPECIAL MASTER: Did everyone get that?</p> <p>12 All right. So there is no perfect way to run a</p> <p>13 hearing like this. I think what I'd like to do is go</p> <p>14 issue by issue and take up, you know, the various issues</p> <p>15 that are on my mind, and then at the end give you an</p> <p>16 opportunity to raise any issues that we haven't covered.</p> <p>17 And in no particular order, I've just jotted down five</p> <p>18 issues that I'd like to cover.</p> <p>19 First, the first is an issue that nobody raised</p> <p>20 except me, which is it is premature for the special</p> <p>21 master to be issuing a report and recommendation on the</p> <p>22 appropriateness of the settlement when there's a motion</p> <p>23 pending to appoint co-lead counsel that would</p> <p>24 potentially impact that -- that -- you know, the</p> <p>25 fairness and reasonableness of the settlement.</p>	<p style="text-align: right;">Page 20</p> <p>1 that's just words of caution.</p> <p>2 So I guess I'd like to ask Mr. Cooper and/or</p> <p>3 Mr. Scarpulla, is it premature for me to submit a report</p> <p>4 and recommendation on these issues on the 15th when you</p> <p>5 are going to have a hearing, I believe on January 17, on</p> <p>6 your motion to be appointed co-lead counsel to represent</p> <p>7 the interests of class members in -- in non-repealer</p> <p>8 states?</p> <p>9 MR. COOPER: I guess we have debated that issue</p> <p>10 back and forth, Your Honor, as to what to do before we</p> <p>11 filed. We debated that question before we filed a</p> <p>12 motion. And we know the schedule is the one that is</p> <p>13 set, and we have not asked the court to change the</p> <p>14 schedule or asked you to change the schedule. We do not</p> <p>15 have any intention, if appointed co-lead counsel, of</p> <p>16 doing anything other than proceeding with the objections</p> <p>17 which have been advanced.</p> <p>18 So we would be proceeding with those objections</p> <p>19 with or without the designation. The defendants raised</p> <p>20 the question in response to the motion to be appointed</p> <p>21 as to whether we would be withdrawing from the</p> <p>22 settlements. And we said, you know, finally we filed</p> <p>23 that we can't withdraw from a contract that Mr. Alioto</p> <p>24 entered into.</p> <p>25 We can object, and we can be the court</p>
<p style="text-align: right;">Page 19</p> <p>1 Second, the issue of the appropriateness of</p> <p>2 releasing the class members in non-repealer states and</p> <p>3 releasing the class members in the three repealer states</p> <p>4 that were omitted from the litigation class.</p> <p>5 Third, the issue of the adequacy of the notice.</p> <p>6 Fourth, issues that have been raised by</p> <p>7 objectors relating to the Chunghwa settlement.</p> <p>8 And fifth, the issue raised by the Attorney</p> <p>9 General of -- as to whether the claim deadline should be</p> <p>10 extended and other issues that the Attorney General has</p> <p>11 raised in her statement of interest.</p> <p>12 So those are the top items on my hit list, and</p> <p>13 then we can certainly discuss anything after that. For</p> <p>14 those who haven't appeared before me, I mean, just</p> <p>15 realize that Ms. Cohen and I have read all the briefs.</p> <p>16 I get sort of restive when people repeat what's in their</p> <p>17 briefs, particularly if they do so at great length. So</p> <p>18 please, you know, try to keep your -- your comments</p> <p>19 succinct.</p> <p>20 There are a lot of people who probably want to</p> <p>21 talk today, and I want to have the chance to give</p> <p>22 everybody a full and fair hearing. On the other hand,</p> <p>23 we have a lot to do to get this report and</p> <p>24 recommendation in shape, and I don't want to spend an</p> <p>25 unreasonable amount of time in an oral hearing. So</p>	<p style="text-align: right;">Page 21</p> <p>1 designated people to actually advance and advocate for</p> <p>2 this group, this large group of people, the non-repealer</p> <p>3 states that have not had anyone advocating for them</p> <p>4 where their rights and the interests have been</p> <p>5 abandoned. We think that the objections would be the</p> <p>6 same. So I don't think it would make any difference</p> <p>7 whether you delayed or didn't delay. You would be</p> <p>8 facing the same questions and issues.</p> <p>9 SPECIAL MASTER: Well, I mean, hypothetically</p> <p>10 -- and I appreciate this isn't an issue for me, it's for</p> <p>11 Judge Tigar, but hypothetically, if you were appointed</p> <p>12 in some capacity, co-lead counsel or allocation counsel</p> <p>13 or something, you know, would you want to do due</p> <p>14 diligence? Would you want to do discovery? Would you</p> <p>15 want to say to the court we object to the special</p> <p>16 master's report and recommendation that just came out</p> <p>17 two days ago and we essentially want a do-over?</p> <p>18 MR. COOPER: Well, we have -- we have a</p> <p>19 schedule for objecting if necessary or we decide to, you</p> <p>20 know, report recommendations. The objections that we've</p> <p>21 logged are the same. It's showing that as has been made</p> <p>22 by Mr. Alioto with regard to the propriety and adequacy</p> <p>23 of the settlement is presumably the same.</p> <p>24 We've asked for discovery with regard to the</p> <p>25 fee matters, and I realize we're not doing that. I</p>

<p style="text-align: right;">Page 22</p> <p>1 believe some people have asked for discovery. But  2 there's been a showing, such as it is, with regard to  3 the adequacy of the settlement and why nothing is being  4 recovered in any way, shape or form for the non-repealer  5 state people. Those arguments are the same whether we  6 have the designation of co-lead counsel or not.  7 SPECIAL MASTER: Okay. So I take it your  8 answer is, to my question is no. It's not premature. I  9 should go ahead and issue the report and the  10 recommendation on the -- on the same schedule?  11 MR. COOPER: I guess that's the answer, yes.  12 Yes, it might be premature for other reasons. For  13 example, we've suggested with regard to the notice that  14 you ought to have an independent expert who can  15 actually, from an expert's perspective, evaluate the  16 notice issues that, to my knowledge, we've not acted on  17 that in any way. So that might be one reason why you  18 would -- it would be appropriate to do it.  19 But I guess what I'm trying to say is the  20 objections are the objections. If you feel that there's  21 a reason why designation as co-lead counsel -- and the  22 co-lead was to be Mr. Scarpulla and myself for this  23 group of people. It wasn't that we would be co-lead  24 with Mr. Alioto for the entire --  25 SPECIAL MASTER: I understand.</p>	<p style="text-align: right;">Page 24</p> <p>1 about it. We need to address the issues right now.  2 SPECIAL MASTER: All right. Thank you. At the  3 end of the table?  4 MR. BONSIGNORE: Can you hear me?  5 SPECIAL MASTER: Mr. Bonsignore, yes.  6 MR. BONSIGNORE: Okay. I didn't want to yell  7 again. My name is Robert Bonsignore, and I also put in  8 a request to be appointed co-lead. I would say that it  9 is premature because once the co-leads are appointed,  10 they have an interest to streamline the issues and also  11 to revisit what's been filed. Also a lot of things  12 weren't done. I personally think that it's premature,  13 especially given the authority that Judge Tigar is  14 likely, given the typical powers of appointment, the  15 powers that Judge Tigar is likely to give the co-leads  16 for these excluded plaintiffs.  17 So I take the opposite position of Mr. Cooper.  18 In framing the issue, you listed everything that I would  19 have put out there, and so I'm not going to bother  20 repeating myself -- yourself, rather.  21 SPECIAL MASTER: And just remind me. When did  22 you make this request to be appointed co-lead counsel?  23 MR. BONSIGNORE: Just -- I'll pull it up.  24 SPECIAL MASTER: So it was -- it was in --  25 MR. COOPER: It was in a reply brief.</p>
<p style="text-align: right;">Page 23</p> <p>1 MR. COOPER: Yeah.  2 SPECIAL MASTER: Mr. Scarpulla?  3 MR. SCARPULLA: Yes, Your Honor, just to follow  4 up on that. It probably makes a difference what Judge  5 Tigar does in terms of the responsibilities of any  6 co-leads if he decides to appoint them. So it might be  7 a good idea to ask him what -- what he wants.  8 MR. COOPER: I think it's clear from our answer  9 to your question, Your Honor, that there's some  10 ambivalence about that question which, as I said when we  11 started, we debated about as to whether that would or  12 would not be the appropriate way. And we came down on  13 the side of not asking the schedule be changed.  14 SPECIAL MASTER: Okay.  15 MR. COOPER: But we're acknowledging, I guess,  16 the legitimacy of your inquiry.  17 SPECIAL MASTER: Okay. Thank you.  18 Mr. Alioto?  19 MR. ALIOTO: Yes, thank you, Your Honor.  20 There's no ambivalence on our side. This matter is  21 squarely before Your Honor. There's a court order  22 scheduled in place. There's been no request for relief  23 to delay things. A lot of this matter is going to have  24 to be reviewed again by Judge Tigar de novo. The matter  25 is ripe. The matter is tee'd up. No ambivalence at all</p>	<p style="text-align: right;">Page 25</p> <p>1 MS. KIRKHAM: It was on the schedule for the  2 opposition/response, that it was a joinder and request  3 -- a joinder in our motion and request to be added as  4 another lead counsel.  5 MR. BONSIGNORE: It was either December 24th or  6 25th because I remember the preparation was less  7 than popular in my office.  8 MR. COOPER: It was December 28th. It was  9 December 28th, the due date for the oppositions.  10 MS. MOORE: Your Honor?  11 SPECIAL MASTER: Ms. Moore.  12 MS. MOORE: First of all, I think the court has  13 changed the date of the hearing on the motion for  14 co-lead counsel to the 21st. So there's a little bit  15 more time. And I think that the court would be --  16 SPECIAL MASTER: There's more time for the  17 judge. There's not more time for me.  18 MS. MOORE: No more time for you.  19 It seems to me the judge would be interested in  20 hearing or seeing your report, and I think that that  21 would inform him on the motion.  22 SPECIAL MASTER: All right. Anyone else have  23 any thoughts on this before we get down --  24 MR. BONSIGNORE: I object to her logic. I  25 think it's self-serving and makes no sense to me.</p>



<p style="text-align: right;">Page 26</p> <p>1 SPECIAL MASTER: Noted.</p> <p>2 All right. All right. Let's move on then.</p> <p>3 Thank you for that. Let's move on then to the issue of</p> <p>4 the appropriateness of -- well, let me first ask a</p> <p>5 preliminary question.</p> <p>6 Mr. Alioto seemed to suggest in I think his</p> <p>7 most recent filing that it might be possible to separate</p> <p>8 the approval of the settlement amount with the</p> <p>9 defendants, that is, the approval of the total amount of</p> <p>10 the settlement as being fair, adequate and reasonable</p> <p>11 and somehow separate or defer -- I wasn't quite sure</p> <p>12 what was being suggested -- the issue of the fairness,</p> <p>13 reasonableness and adequacy of the allocation plan.</p> <p>14 Mr. Alioto, just before we get to the merits of</p> <p>15 that issue, what did you have in mind there?</p> <p>16 MR. ALIOTO: Well, what I had in mind was this,</p> <p>17 Your Honor. The starting point for these settlements is</p> <p>18 the settlement agreements themselves. That sets out all</p> <p>19 of the essential terms of the settlements. That's what</p> <p>20 we referred to as the settlement.</p> <p>21 The plan of allocation is something that we,</p> <p>22 the indirect purchaser lawyers, have put together. It's</p> <p>23 something that in our best judgment will effectuate the</p> <p>24 settlements. This is not all spelled out. This plan of</p> <p>25 allocations, the releases, the notice provisions, the</p>	<p style="text-align: right;">Page 28</p> <p>1 in your mind if -- if I were to say all right, the</p> <p>2 settlement vis-à-vis the defendants is fair, adequate</p> <p>3 and reasonable. \$576 million, given all the factors</p> <p>4 that you're supposed to consider, is an appropriate</p> <p>5 settlement, but the plan of allocation proposed is</p> <p>6 faulty in these ways. That would have the result of not</p> <p>7 sending you back to the negotiation table with the</p> <p>8 defendants, but it would require you to do some in-house</p> <p>9 tinkering perhaps with the allocation plan.</p> <p>10 And I -- by suggesting it, I do not mean to</p> <p>11 suggest I am headed in that direction. I just throw</p> <p>12 that out -- I just want to know if -- would that create</p> <p>13 any procedural or legal problems if I were to proceed</p> <p>14 that way?</p> <p>15 MR. ALIOTO: Yes. No, that would be welcome.</p> <p>16 One part of that would not be welcome was -- would be if</p> <p>17 you were to come to the conclusion that our proposal was</p> <p>18 not reasonable and not adequate, that -- that would</p> <p>19 cause some concern.</p> <p>20 But to the extent you felt that there were</p> <p>21 other reasonable ways to approach this or other ways to</p> <p>22 get this settlement approved and accommodate the</p> <p>23 interests of objectors and the attorney general, we</p> <p>24 would be open to that, and we would welcome this kind of</p> <p>25 piecemeal approach, the underlying settlement approved,</p>
<p style="text-align: right;">Page 27</p> <p>1 various -- the various terms attendant to the underlying</p> <p>2 settlements, they're not set out anywhere. This is a</p> <p>3 plan devised by indirect purchaser counsel in</p> <p>4 consultation with experts and notice experts.</p> <p>5 And what I meant to suggest there is that this</p> <p>6 plan of allocation is reasonable. This plan is</p> <p>7 sustainable. This plan ought to be implemented. \$576</p> <p>8 million ought to be distributed to the claimants, but</p> <p>9 our broader goal is to get something done. And to the</p> <p>10 extent Your Honor feels that yes, it's reasonable, but</p> <p>11 I'd like to adopt plan B, which is also reasonable, or</p> <p>12 plan C, which is also reasonable -- I have no pride of</p> <p>13 authorship here. I'm not dug in. My goal is to get</p> <p>14 this settlement approved.</p> <p>15 That's what the thought is there when we cited</p> <p>16 that law to you that says there's the underlying</p> <p>17 settlements and there's the plan. There may be</p> <p>18 different ways to get this done to get everybody happy.</p> <p>19 I don't -- I certainly am not advocating for these other</p> <p>20 ways, but if those other ways meet due process and</p> <p>21 they're fair and reasonable and we can accommodate</p> <p>22 somebody's concerns, we're more than willing to do that</p> <p>23 to get this done.</p> <p>24 SPECIAL MASTER: So hypothetically, and I</p> <p>25 really mean hypothetically, would it create any problems</p>	<p style="text-align: right;">Page 29</p> <p>1 then get on to the approval of the allocation. And I'm</p> <p>2 not saying that has to be months apart. But --</p> <p>3 SPECIAL MASTER: Well, the settlement</p> <p>4 officially as proposed under this hypothetical would not</p> <p>5 be approved. The terms of the settlement vis-à-vis the</p> <p>6 defendants would be approved, but you would have to go</p> <p>7 back and propose another plan of allocation to fix</p> <p>8 whatever defects I found.</p> <p>9 MR. ALIOTO: Yes. And again, I don't know that</p> <p>10 you have to determine that they are defects. I think</p> <p>11 you could -- you could identify matters that could be</p> <p>12 addressed and solved in different ways. And I'm sure we</p> <p>13 could put our heads together and come up with something</p> <p>14 that's very close to what we proposed and that would</p> <p>15 moot concerns.</p> <p>16 SPECIAL MASTER: Okay.</p> <p>17 MR. ALIOTO: I mean --</p> <p>18 SPECIAL MASTER: So I don't -- anyone else have</p> <p>19 any thoughts about this? What about the defendants? If</p> <p>20 I were to proceed that way, would that cause any</p> <p>21 heartburn for the defendants?</p> <p>22 MR. SCARBOROUGH: Your Honor, Mike Scarborough</p> <p>23 for the Samsung SDI defendants, and I'll attempt to</p> <p>24 articulate a general defense consensus.</p> <p>25 I think what Your Honor outlined would be</p>

<p style="text-align: right;">Page 30</p> <p>1 constructive, and I think it would be welcome for our 2 side. Our primary interest is in getting the 3 agreements, the contracts that we entered into approved 4 in terms of the amount of money being paid collectively 5 and the releases that we bargained for being approved as 6 fair, adequate and reasonable.</p> <p>7 And we do believe that the allocation issues 8 logically can come later, later down the line. And so 9 we would like to get at least past that first hurdle of 10 the underlying agreements vis-à-vis the defendants are 11 fair, adequate and reasonable and deserving of a final 12 approval.</p> <p>13 And we do view many of the objections as really 14 going to allocation issues, and as a general matter we 15 don't have a problem with some tinkering being done to 16 the plan of allocation proposed by lead counsel.</p> <p>17 SPECIAL MASTER: Okay. Mr. Scarpulla.</p> <p>18 MR. SCARPULLA: Yes, Your Honor. On that -- 19 first of all, I think I heard Mr. Scarborough say 20 something about the releases. That's a different issue 21 than the amount of money because the releases, of 22 course, release claims by half the country for zero 23 consideration.</p> <p>24 SPECIAL MASTER: No, but -- I'm sorry to 25 interrupt. But I mean hypothetically, you could say the</p>	<p style="text-align: right;">Page 32</p> <p>1 MR. COOPER: Can I supplement? Maybe I'm 2 saying the same thing in a different way. In order to 3 --</p> <p>4 SPECIAL MASTER: Try not to.</p> <p>5 MR. COOPER: In order to rule on the adequacy 6 of a settlement, you have to know what claims you're 7 settling. Here we know that the claims of over half the 8 country were valued at zero. And it seems very clear 9 from everything that's gone on, the amount of money that 10 was paid was paid for those claims which Mr. Alioto felt 11 had merit. Nothing was paid for those claims which had 12 no merit in Mr. Alioto's view.</p> <p>13 So if you're now going to pay money to those 14 people, you've got to take it away under that procedure 15 from the claimants whose claims were being settled for a 16 fixed amount of money, which reduces it by \$1 or more, 17 reduces the amount available.</p> <p>18 There's been however many notices that have 19 gone out that have told people if you're not in those 21 20 jurisdictions, you're not going to get paid. You'd have 21 to be renoticing, seeing what objections there would be.</p> <p>22 Now it might be possible to say that amount of 23 money takes care of the claims in 22 jurisdictions and 24 get rid of the national class and leave those 25 non-repealer people on to their own devices, to have a</p>
<p style="text-align: right;">Page 31</p> <p>1 releases are appropriate, but there's got to be some 2 compensation paid to those people --</p> <p>3 MR. SCARPULLA: Correct.</p> <p>4 SPECIAL MASTER: -- which is not an issue, I 5 take it, that would bother the defendants. They don't 6 care how the money -- to whom the money is paid, they 7 just want their releases.</p> <p>8 MR. SCARPULLA: Yes, Your Honor, that is 9 correct, and I was getting to that point, which would 10 mean that the amount of money is therefore not 11 sufficient because you'd be spreading it out -- if they 12 settle for half the country, not the whole country, then 13 you'd be spreading it out over the whole country. You'd 14 have to give new notice to everybody. I mean, there are 15 all those issues.</p> <p>16 And remember, as Your Honor may recall in LCDs, 17 we settled that case, including for the states, 18 \$1.1 billion. The conspiracy here was of longer 19 duration. There were hundreds of meetings throughout 20 the world. Hundreds more than in LCDs. The affected 21 commerce was much larger, and the settlement was half 22 that amount and excluded three repealer states. So if 23 you include them in, you'll have to get more money from 24 somewhere, Your Honor, to --</p> <p>25 SPECIAL MASTER: Okay. Got it.</p>	<p style="text-align: right;">Page 33</p> <p>1 different counsel represent them, attempt to get class 2 certification or whatever went on; to litigate the 3 issues of whether they have claims, or, as Mr. Alioto 4 says, they have no claim.</p> <p>5 But to try to separate them here without 6 knowing how much money that's going to go to those 7 people, whether that now leaves an adequate amount for 8 the non-repealer states and for the repealer states -- 9 you know, are they going to get one dollar, are they 10 going to get 50 percent of the money. You'd need to 11 know all of those issues to be able to evaluate the 12 adequacy of the settlement. So what claims are being 13 settled is the first question.</p> <p>14 SPECIAL MASTER: Okay. I don't want to spend 15 any more time on this. Anyone have something new that 16 hasn't been said before?</p> <p>17 Ms. Moore.</p> <p>18 MS. MOORE: Your Honor, in order to approve the 19 settlement, there's certain foundational evidence that 20 needs to be in the record, and one of the things that 21 needs to be is that everything is valued, and not all 22 the claims are valued.</p> <p>23 There was nothing in the record that any of 24 these other claims were valued, any of these states that 25 were left out or any of these non-repealer or repealer</p>

<p style="text-align: right;">Page 34</p> <p>1 states that were left out. There was no evidence that  2 they were considered and valued. Not until later on in  3 the reply after it was attacked did they say oh, there  4 was no value.  5 So essentially they didn't consider them at  6 all, which makes the \$576 million completely  7 inappropriate. And so you can't approve the settlement  8 at that amount when all of these people being released  9 were never even looked at and valued.  10 SPECIAL MASTER: Okay.  11 MR. SCARPULLA: Excuse me. There's one other  12 thing I think that Judge Tigar raised in the directs  13 maybe about evidence of what each class member would get  14 if there had been a successful trial as opposed to how  15 much they get in this settlement. And I don't recall  16 seeing that in the record yet.  17 MS. MOORE: No, it has not come up in the  18 record, and we've asked multiple times. In LCD we knew  19 exactly what each panel -- the damages were for each  20 panel, for each claimant. So knowing the claims rate  21 and knowing the value of each is vitally important to  22 valuing the settlement. And you can't approve the  23 settlement without that information. And to this day,  24 it's still not in the record. But we know that when  25 Janet Netz made her expert report and valued the whole</p>	<p style="text-align: right;">Page 36</p> <p>1 MR. ALIOTO: I'm pretty sure there is, Your  2 Honor. And I know this for a fact, that we did that  3 analysis. Our expert Janet Netz did that analysis.  4 What was the overcharge on tubes and monitors? It was a  5 higher overcharge. What was the overcharge on tubes in  6 small televisions? What was the overcharge on tubes in  7 large televisions? All of that analysis was done.  8 SPECIAL MASTER: And is in her report --  9 MR. ALIOTO: Yes.  10 SPECIAL MASTER: -- which is in the record.  11 MR. ALIOTO: Is in the record. And it may have  12 also been cited when we filed our motion for preliminary  13 approval -- I'm going back a little ways here, but in  14 the northern district there is a rule that as part of a  15 preliminary approval motion, you have to make a -- as  16 part of your prove-up you have to show the damages and  17 the range of damages, and I'm quite sure that that  18 showing was made in our original papers.  19 SPECIAL MASTER: All right.  20 MS. MOORE: Your Honor --  21 MR. ALIOTO: That's our response to that.  22 MS. MOORE: It wasn't -- it's the panel --  23 SPECIAL MASTER: You know, we've got to get on  24 with the meat of the objections here.  25 MS. MOORE: Actually --</p>
<p style="text-align: right;">Page 35</p> <p>1 case at \$2.7 billion, there must have been an individual  2 damage analysis, which I know there was in LCD.  3 SPECIAL MASTER: Did you want to respond to  4 that?  5 MR. ALIOTO: Well, no. We have certain issues  6 that we came prepared to address, and one of the things  7 that has not been addressed by objectors is the amount  8 of the settlement and the comparability to LCD and did  9 we get enough money. I just want to note for the record  10 we -- we have enough issues to discuss here today.  11 That's something that has not been raised.  12 SPECIAL MASTER: But the point --  13 MS. MOORE: Well, it was raised.  14 SPECIAL MASTER: Wait, wait. The point that's  15 being made by Ms. Moore is you can't just -- the court  16 can't just say: Okay, 576 million, that's a lot of  17 money, that's okay.  18 You have to know or have some sense of the  19 range of the value of each individual class member's  20 claim. And they may be different values depending on  21 how they're situated and what they're going to get in  22 the settlement so that you can compare what a class  23 member would have gotten if they went to trial with what  24 they're getting in the settlement. And Ms. Moore says  25 there's nothing to that effect in the record.</p>	<p style="text-align: right;">Page 37</p> <p>1 SPECIAL MASTER: I don't want to go on much  2 longer on this.  3 MS. MOORE: May I say one thing?  4 SPECIAL MASTER: Yes.  5 MS. MOORE: It is important to this meet the  6 settlement. You need the dollar amount per panel. So  7 we know that for a panel it was \$65 in damages in LCD.  8 We don't have that number in this case, so we can't  9 evaluate it.  10 MR. COOPER: I would just request that Mr.  11 Alioto -- we're not aware of where Ms. Netz's report,  12 damage study report for trial is in the record. So I'm  13 not certain what he's referring to.  14 SPECIAL MASTER: Was her -- wait, please.  15 Was her deposition taken?  16 MR. ALIOTO: Yes.  17 MR. COOPER: And filed -- they're not filed.  18 They're not in the clerk's office. They weren't filed.  19 They're not available to generally -- generally to  20 people. We never saw them. We're lawyers in the case,  21 and we weren't allowed to see them.  22 SPECIAL MASTER: Was her report not made an  23 exhibit to her deposition?  24 MR. ALIOTO: It was -- it was an exhibit to her  25 deposition.</p>

<p style="text-align: right;">Page 38</p> <p>1 MR. COOPER: The deposition was confidential.</p> <p>2 MR. ALIOTO: But they're counsel of record.</p> <p>3 They've signed the protective order.</p> <p>4 SPECIAL MASTER: All right.</p> <p>5 MS. CAPURRO: It's also in the record. It was</p> <p>6 filed as part of our opposition to summary judgment.</p> <p>7 MR. COOPER: Not an unredacted --</p> <p>8 SPECIAL MASTER: Was there a -- was there a --</p> <p>9 MS. CAPURRO: And it's also referenced in --</p> <p>10 SPECIAL MASTER: Was there a Daubert motion?</p> <p>11 MR. ALIOTO: Yes.</p> <p>12 SPECIAL MASTER: There was a Daubert motion.</p> <p>13 So guess who ruled on it? And so I certainly saw her</p> <p>14 report.</p> <p>15 MR. ALIOTO: And when those are filed, Your</p> <p>16 Honor, they're not in the court record, they're under</p> <p>17 seal in the court record, but they go by separate email</p> <p>18 to all of the indirect purchaser counsel because they're</p> <p>19 parties to the protective order. So these folks have</p> <p>20 all that information.</p> <p>21 SPECIAL MASTER: Okay.</p> <p>22 MR. BONSIGNORE: I just -- make -- I did not</p> <p>23 get it by email at all. The information that would be</p> <p>24 helpful to me in relationship to a case that I had that</p> <p>25 was -- that we actually succeeded in doing what you're</p>	<p style="text-align: right;">Page 40</p> <p>1 MS. KIRKHAM: I'll work on eloquent here and</p> <p>2 brevity. Brevity perhaps more important than eloquence.</p> <p>3 In the adequacy -- the adequacy of the</p> <p>4 settlement with regard to the non-repealer state claims,</p> <p>5 where we begin is with lead counsel's repeated</p> <p>6 statements that they value the claims as zero. So I</p> <p>7 think we can agree that that's been established as a</p> <p>8 fact.</p> <p>9 We know that, for example, the 500 plus million</p> <p>10 dollar settlement is compared in their papers to Dr.</p> <p>11 Netz's \$2.8 billion damage number. That number is for</p> <p>12 the 21 damage class states. So those are the purchases</p> <p>13 that occurred in those states. We don't know -- we</p> <p>14 could compute it if we actually had a per panel and some</p> <p>15 information about sales of what it is in the other</p> <p>16 states, but I don't believe Dr. Netz ever did that.</p> <p>17 So we have, so we're beginning with the idea</p> <p>18 that what we have, what you have before you and the real</p> <p>19 fundamental question you have before you really is are</p> <p>20 those claims valueless. Are they meritless. And are</p> <p>21 they so demonstratively meritless that without affording</p> <p>22 the possessors of those claims, the due process under</p> <p>23 Rules 12 or 56, you can say that they should be released</p> <p>24 here. They should be dismissed with prejudice because</p> <p>25 the effect of approving this settlement is exactly the</p>
<p style="text-align: right;">Page 39</p> <p>1 proposing was the claims rate. We don't have any</p> <p>2 information yet on the claims rate. We don't know if</p> <p>3 there's a surplus or whether people will get a cut down.</p> <p>4 The excluded states, according to the terms of the</p> <p>5 settlement agreement, you'd have to very carefully craft</p> <p>6 language that would not cause them to waive their rights</p> <p>7 to proceed in economic recovery. And I'm just going to</p> <p>8 cut it there.</p> <p>9 Just with a grain of salt, I approached Mr.</p> <p>10 Alioto at least a dozen times before today and asked him</p> <p>11 to let's talk about it. And although he's wide open to</p> <p>12 the suggestion today, which is very positive, very good,</p> <p>13 maybe it was something that you said, but before today,</p> <p>14 he had dug in and wasn't going to change anything. So</p> <p>15 this is -- you've already made progress.</p> <p>16 SPECIAL MASTER: All right. So the next issue</p> <p>17 really I want to talk about is the merits of the -- are</p> <p>18 the merits of the objections that have been raised to</p> <p>19 the failure of the allocation plan with any monetary</p> <p>20 compensation to the residents or the purchasers in the</p> <p>21 non-repealer states and the three omitted repealer</p> <p>22 states.</p> <p>23 So I really don't need all those arguments</p> <p>24 repeated, but if there's someone has something eloquent</p> <p>25 to say -- Ms. Kirkham, I see you're raising your hand.</p>	<p style="text-align: right;">Page 41</p> <p>1 same effect as a ruling on summary judgment on those</p> <p>2 claims or a ruling on Rule 12 on those claims.</p> <p>3 So that's essentially what you're doing, but</p> <p>4 not in -- not affording them the due process of those</p> <p>5 procedures. So the claims have to be pretty</p> <p>6 fundamentally meritless at the courthouse door for that</p> <p>7 determination not to be made.</p> <p>8 Now I'm not saying that determination is</p> <p>9 impossible in a class action settlement, but generally</p> <p>10 where you find judges and special masters being willing</p> <p>11 to do that is where you have a situation in which you</p> <p>12 have a factual disparity between two purported class</p> <p>13 members so that you can look at one and you say you</p> <p>14 bought the price fixed product. And in a period that we</p> <p>15 have evidence that the price was artificially inflated</p> <p>16 and therefore we say -- I can look at you and say -- for</p> <p>17 settlement purposes certainly I can say you were</p> <p>18 injured.</p> <p>19 And you over here, Mr. Jones, you bought the</p> <p>20 product, or if it's a securities case, you traded the</p> <p>21 security during the period that the evidence suggests</p> <p>22 that the price was in fact competitive. Maybe the</p> <p>23 conspiracy was still going on, but it fell apart during</p> <p>24 that period. There's some evidence in the case, some</p> <p>25 way the person purchased, some evidence that those</p>

<p style="text-align: right;">Page 42</p> <p>1 purchasers did not damage the individual.</p> <p>2 Now we come to the situation that we have</p> <p>3 here -- and I really think that if you read the Sullivan</p> <p>4 case, you can see that the third circuit was coming to</p> <p>5 grips with this idea. Is what we have here is a</p> <p>6 situation in which you have two class members for whom</p> <p>7 you can say they bought the same product under the same</p> <p>8 circumstances, inflated the same way. The only</p> <p>9 difference is that they're standing on opposite sides of</p> <p>10 a geographic boundary called a state line. And on the</p> <p>11 one side of the state line it's we're home free, and on</p> <p>12 the other side of the state line you say you, because of</p> <p>13 that, despite your factual claim, you can't possibly</p> <p>14 recover under the factual claim.</p> <p>15 We don't have that situation here. Illinois</p> <p>16 Brick doesn't do that. Illinois Brick is a rule of</p> <p>17 evidence fundamentally. The Supreme Court was faced</p> <p>18 with the choice it felt of overruling Hanover Shoe and</p> <p>19 allowing defendants to put in evidence of passthrough or</p> <p>20 enunciating a rule that said what's sauce for the goose</p> <p>21 is sauce for the gander, and the plaintiffs can't put</p> <p>22 that evidence into.</p> <p>23 So if you are a plaintiff and you need evidence</p> <p>24 of passthrough in order to establish your claim, you're</p> <p>25 probably out of luck under Illinois Brick. You still</p>	<p style="text-align: right;">Page 44</p> <p>1 predicate of recovery, any recovery which appears in law</p> <p>2 or in equity. The Clayton Act specifically talks about</p> <p>3 affording a recovery that is reversing, undoing the</p> <p>4 overcharges the defendants collected. There is</p> <p>5 nothing -- the Ninth Circuit has never suggested -- in</p> <p>6 fact, the Ninth Circuit has explicitly endorsed that</p> <p>7 that is one of the policies of the antitrust laws.</p> <p>8 The antitrust laws also -- there are tomes that</p> <p>9 talk about the benefits that the antitrust laws convey</p> <p>10 on society as a whole and the benefits of private</p> <p>11 enforcement of those laws convey on society as a whole.</p> <p>12 So there's not been probably a better situation</p> <p>13 where someone is set up to make an equitable claim for</p> <p>14 monetary relief than someone who is acting as a, quote,</p> <p>15 private attorneys general and coming in and vindicating</p> <p>16 a critical tenet of American not only jurisprudence, but</p> <p>17 indeed of American economic theory and practice, and</p> <p>18 that is competition.</p> <p>19 SPECIAL MASTER: Can I just interrupt a minute?</p> <p>20 Am I correct that the state of the law on recovery of</p> <p>21 equitable monetary relief in non-repealer states is</p> <p>22 number one, everyone agrees there is no federal right to</p> <p>23 such damage?</p> <p>24 MS. KIRKHAM: No, there is.</p> <p>25 SPECIAL MASTER: You're saying there is under</p>
<p style="text-align: right;">Page 43</p> <p>1 actually have the right to come into court and attempt</p> <p>2 to show why it doesn't apply to you. It is not a rule</p> <p>3 of standing. It does not bar people at the courthouse</p> <p>4 door, nor is it the indirect purchaser hostility act.</p> <p>5 SPECIAL MASTER: But why wouldn't it apply --</p> <p>6 you know, assuming it's sound law and the Supreme Court</p> <p>7 doesn't change its mind, why wouldn't it apply to all</p> <p>8 the class members in these states? What would be a</p> <p>9 ground for someone saying I am --</p> <p>10 MS. KIRKHAM: It would --</p> <p>11 SPECIAL MASTER: -- I am entitled to make a</p> <p>12 claim as an exception to Illinois Brick?</p> <p>13 MS. KIRKHAM: We're not -- we're not suggesting</p> <p>14 exceptions to Illinois Brick. We're not suggesting</p> <p>15 claims and exceptions to Illinois Brick. We're just</p> <p>16 suggesting claims that fall outside of Illinois Brick.</p> <p>17 SPECIAL MASTER: All right. Such as?</p> <p>18 MS. KIRKHAM: Okay. Such as the claims for</p> <p>19 equitable monetary relief. They do not require proof of</p> <p>20 pass on, and as soon as you have a claim that does not</p> <p>21 require proof of pass on, Illinois Brick becomes a case</p> <p>22 that sits over here and applies to other people.</p> <p>23 What that is is a situation in which there is</p> <p>24 the inherent power of the federal court to award in a</p> <p>25 situation in which a person proves that the factual</p>	<p style="text-align: right;">Page 45</p> <p>1 the --</p> <p>2 MS. KIRKHAM: We're talking -- I'm talking</p> <p>3 about someone who comes into federal court and alleges a</p> <p>4 violation of the Sherman Act.</p> <p>5 SPECIAL MASTER: Okay.</p> <p>6 MS. KIRKHAM: Yes.</p> <p>7 SPECIAL MASTER: And then there are also -- you</p> <p>8 maintain there would be cognizable state law claims for</p> <p>9 equitable monetary relief in these non-repealer states,</p> <p>10 yes?</p> <p>11 MS. KIRKHAM: Umm --</p> <p>12 SPECIAL MASTER: No?</p> <p>13 MS. KIRKHAM: Probably not in the non-repealer</p> <p>14 states, only because a lot of their state courts have</p> <p>15 said that -- well, let's put it this way: There</p> <p>16 wouldn't be unjust enrichment. Whether there would be</p> <p>17 the same kind of equitable monetary relief granted</p> <p>18 simply for proof of the violation of the state law,</p> <p>19 because the same argument about Illinois Brick that it's</p> <p>20 a rule of evidence applies when it's applied in state</p> <p>21 court to state law as well as when it's applied in</p> <p>22 federal court to federal law.</p> <p>23 But we're not talking -- there are a lot of</p> <p>24 cases -- the cases that Mr. Alioto is citing about</p> <p>25 unjust enrichment, we agree that they go the way they</p>



<p style="text-align: right;">Page 46</p> <p>1 go.</p> <p>2 When Illinois Brick first came down, lawyers</p> <p>3 for plaintiffs tried to avoid Illinois Brick by pleading</p> <p>4 unjust enrichment claims under state common law and</p> <p>5 unjust enrichment, and the state court said hmm-mm,</p> <p>6 we're not going to let you do that. We're not going to</p> <p>7 let you just recast an antitrust claim as an unjust</p> <p>8 enrichment claim.</p> <p>9 I'm not talking about going back and trying to</p> <p>10 do that, to get that reversed, and I am focused and we</p> <p>11 are focused on the federal recovery -- federal monetary</p> <p>12 recovery that the court in KeySpan talked about and that</p> <p>13 the court in LCDs, Judge Illston, talked about when she</p> <p>14 first analyzed that there's a federal right to this.</p> <p>15 And therefore, the state of Oregon, which was saying we</p> <p>16 can do it under a state law, she then leapt over and</p> <p>17 said your state law follows federal law. I think</p> <p>18 there's a federal right. Then I think there's probably</p> <p>19 a state right. And that was her decision on that</p> <p>20 subject. That's why she talks about Oregon law.</p> <p>21 But she's not -- her analysis doesn't begin</p> <p>22 with Oregon law, it begins with KeySpan, it begins with</p> <p>23 a federal right that arises under the antitrust laws</p> <p>24 that if I prove a violation of the antitrust laws, I</p> <p>25 might not be able to prove pass-on because Illinois</p>	<p style="text-align: right;">Page 48</p> <p>1 that raise the question that the claim is valuable?</p> <p>2 SPECIAL MASTER: You're saying, I guess, that</p> <p>3 there is a legitimate split of authority on this issue,</p> <p>4 and, therefore, if there's a split of authority, you</p> <p>5 can't say the claims are worth zero?</p> <p>6 MS. KIRKHAM: Actually, there's nothing against</p> <p>7 it. It's just not been litigated. The authority is</p> <p>8 actually all on the side of the claim. The cases that</p> <p>9 are cited against it in the briefs are not considering</p> <p>10 it.</p> <p>11 SPECIAL MASTER: They're dealing with state</p> <p>12 law.</p> <p>13 MS. KIRKHAM: They're dealing with state law</p> <p>14 unjust enrichment claims or there -- there is the Ninth</p> <p>15 Circuit case that wouldn't give the certain kind of</p> <p>16 relief in the motor vehicles case that got cited down</p> <p>17 the line for people saying so if you can't give federal</p> <p>18 disgorgement, but when you read the motor vehicles case,</p> <p>19 that's not what the Ninth Circuit was saying. On -- it</p> <p>20 wasn't considering this kind of question, and it wasn't</p> <p>21 saying you can never get money in an equitable situation</p> <p>22 if you're an antitrust plaintiff.</p> <p>23 SPECIAL MASTER: Okay. Before I leave you and</p> <p>24 hear from other people, you cited Judge Renfrew's report</p> <p>25 and recommendation and you cited like page 300 and</p>
<p style="text-align: right;">Page 47</p> <p>1 Brick says I can't. But if I prove this violation, I</p> <p>2 can ask the court to give me a monetary equitable remedy</p> <p>3 that is disgorgement or restitution.</p> <p>4 SPECIAL MASTER: Okay. I can see that this</p> <p>5 argument and this line of thought would be a wonderful</p> <p>6 law review article, but is there any authority out there</p> <p>7 that says in the federal context that there -- despite</p> <p>8 Illinois Brick, we are going to allow you to pursue a</p> <p>9 federal claim for equitable monetary relief?</p> <p>10 MS. KIRKHAM: There is the KeySpan case which</p> <p>11 dealt with a governmental entity, and there is Judge</p> <p>12 Illston's decision in LCDs. There is judge -- the</p> <p>13 adoption by Chief Judge Hamilton of Judge Renfrew's</p> <p>14 report and recommendation in DRAM. And then there are</p> <p>15 the cases that we cited and the development of the law</p> <p>16 this way that we cited in our brief from the antitrust</p> <p>17 treatise that actually Mr. Varanini knows more about</p> <p>18 than I do, since he was one of the editors or authors or</p> <p>19 both.</p> <p>20 SPECIAL MASTER: And that's it?</p> <p>21 MS. KIRKHAM: And so far that's it.</p> <p>22 SPECIAL MASTER: Okay.</p> <p>23 MS. KIRKHAM: However, Your Honor, the decision</p> <p>24 you're making is, is that enough that you can say all of</p> <p>25 that goes away and zero is the right number, or does</p>	<p style="text-align: right;">Page 49</p> <p>1 something. And the report and recommendation that I</p> <p>2 have from Judge Renfrew only goes up to page 200.</p> <p>3 Are you referring to some other report.</p> <p>4 MS. KIRKHAM: Yes, the Lexis -- I'm citing to</p> <p>5 the pages of the -- of Judge Hamilton's order adopting</p> <p>6 it, which attached the whole thing. So the paging is</p> <p>7 off. If you've got one from him, you have what he filed</p> <p>8 in federal court, so you'd have what it looks like in</p> <p>9 the docket. What I was citing to is a brief. I'm sorry</p> <p>10 for the confusion -- was a Lexis.</p> <p>11 SPECIAL MASTER: Okay.</p> <p>12 MS. KIRKHAM: So everyone would be able to have</p> <p>13 it because you'd have to otherwise go to the DRAM</p> <p>14 docket.</p> <p>15 SPECIAL MASTER: Okay. Just for everybody's</p> <p>16 information, I have access to Westlaw. I do not have</p> <p>17 easy access to Lexis. Just --</p> <p>18 MS. KIRKHAM: We'll send -- Your Honor --</p> <p>19 SPECIAL MASTER: -- limited resources at JAMS.</p> <p>20 MS. KIRKHAM: -- I will submit a letter that</p> <p>21 redoes the citations to the -- I don't know if it's</p> <p>22 still on Westlaw, but to the docket version, the DRAM</p> <p>23 docket version of the report and recommendation.</p> <p>24 SPECIAL MASTER: All right. Thank you.</p> <p>25 Now, on this issue, does anyone else have</p>

<p style="text-align: right;">Page 50</p> <p>1 anything to say? I presume the answer is yes.</p> <p>2 MS. MOORE: I just wanted to point out that in</p> <p>3 the original settlement in this case with Chunghwa, I</p> <p>4 believe in their paper -- in the defendants' papers</p> <p>5 where they were arguing for final approval, they argued</p> <p>6 what is essentially the equitable monetary relief.</p> <p>7 SPECIAL MASTER: Who argued it?</p> <p>8 MS. MOORE: Chunghwa, and they said there was a</p> <p>9 colorable federal claim in all 50 states, and they --</p> <p>10 and the papers indicated that everybody would get paid,</p> <p>11 which is why now here we are years and years and years</p> <p>12 later and that's not happening.</p> <p>13 So they -- they filed a -- it was the</p> <p>14 plaintiffs who filed the motion for final approval, and</p> <p>15 I think there were objections, and the defendants filed</p> <p>16 an opposition or a reply to those objections, and it's</p> <p>17 in those papers. I can find them if you want. They're</p> <p>18 quoted in my original objection papers here, and then I</p> <p>19 can find them for you if you want.</p> <p>20 SPECIAL MASTER: All right. All right. Mr.</p> <p>21 Bonsignore.</p> <p>22 MR. BONSIGNORE: Briefly, Your Honor, there are</p> <p>23 statutory claims in Massachusetts and New Hampshire,</p> <p>24 although the New Hampshire ones might have postdated</p> <p>25 prior to the settlements. New Hampshire also had and</p>	<p style="text-align: right;">Page 52</p> <p>1 suggestion in one of the briefs that in the LG release</p> <p>2 settlement, that the same type of release, same scope of</p> <p>3 release was -- was given to LG that was given to the</p> <p>4 defendants in these settlements and nobody raised a</p> <p>5 peep. Is that true or untrue?</p> <p>6 MR. ALIOTO: That's correct.</p> <p>7 SPECIAL MASTER: Okay.</p> <p>8 MS. MOORE: Your Honor, it becomes more obvious</p> <p>9 at the time of distribution. A lot of times it's not</p> <p>10 obvious until we get to distribution and then you</p> <p>11 realize there are issues.</p> <p>12 MR. BONSIGNORE: I was told by Mr. Alioto -- I</p> <p>13 put it in my papers. I was told repeatedly that my</p> <p>14 states would be taken care of at the end. And if I</p> <p>15 hadn't heard that, I would have been jumping up and down</p> <p>16 filing, objecting, going and zealously representing my</p> <p>17 clients. It's horrible that those states are left out,</p> <p>18 especially Massachusetts, because our law is stronger</p> <p>19 than the California law. I know it's a debate, but I</p> <p>20 always say it, and I'm going to say it now. To leave</p> <p>21 out those states is no excuse. And once the mistake was</p> <p>22 caught, it should have been corrected instantly. I</p> <p>23 don't know what someone is thinking to think that that's</p> <p>24 the way it should go through.</p> <p>25 SPECIAL MASTER: Okay. I really think I need</p>
<p style="text-align: right;">Page 51</p> <p>1 Massachusetts also have common law claims under their</p> <p>2 consumer protection statutes. I cited those in the</p> <p>3 brief. In fact, I was involved in both cases, and so I</p> <p>4 know them very well.</p> <p>5 With regard to Missouri, Missouri was in a</p> <p>6 similar situation as Massachusetts and New Hampshire was</p> <p>7 before the supreme court addressed it. And, in fact,</p> <p>8 the attorney general of Missouri has taken a position</p> <p>9 that indirect purchaser claims are allowed under those</p> <p>10 states.</p> <p>11 SPECIAL MASTER: Missouri is a repealer state,</p> <p>12 isn't it?</p> <p>13 MR. BONSIGNORE: Yes, it shouldn't be a</p> <p>14 problem, but if I got to beat a dead horse, I'll beat a</p> <p>15 dead horse briefly.</p> <p>16 SPECIAL MASTER: All right. Consider it</p> <p>17 beaten.</p> <p>18 MR. BONSIGNORE: Briefly.</p> <p>19 SPECIAL MASTER: Did you want to respond on</p> <p>20 this issue? I don't know who is going to do it from</p> <p>21 your side.</p> <p>22 MR. ALIOTO: I'm going to address it, if you</p> <p>23 don't mind, Your Honor.</p> <p>24 SPECIAL MASTER: Before we -- before I give Mr.</p> <p>25 Alioto a full -- full reign here, wasn't there some</p>	<p style="text-align: right;">Page 53</p> <p>1 to give Mr. Alioto a chance here or his designee.</p> <p>2 MR. ALIOTO: Okay. Thank you, Your Honor.</p> <p>3 Just for the record, Mr. Bonsignore's --</p> <p>4 SPECIAL MASTER: And let me focus your --</p> <p>5 MR. ALIOTO: -- statements about what I said</p> <p>6 and what I didn't say, I'm not going to go into that.</p> <p>7 It's not evidence, but I want the record to be clear on</p> <p>8 that. But go ahead, Your Honor, excuse me.</p> <p>9 SPECIAL MASTER: Yeah, I mean the -- I really</p> <p>10 understand all the arguments you've raised, but the core</p> <p>11 question is is there a split of authority here, a</p> <p>12 legitimate, not concocted, but a legitimate split of</p> <p>13 authority as to whether there is a federal right of</p> <p>14 action that indirect purchasers in non-repealer states</p> <p>15 could pursue? And if there is that split of authority,</p> <p>16 how -- how is it reasonable to value the claims at zero.</p> <p>17 MR. ALIOTO: All right. Thank you, Your Honor.</p> <p>18 I'd like to answer that, but I'd like to give Your Honor</p> <p>19 the full picture of how these cases get settled and how</p> <p>20 lead counsel in the exercise of his discretion --</p> <p>21 MR. SCARPULLA: We cannot hear down here, Mr.</p> <p>22 Alioto. I'm sorry. He has to speak up.</p> <p>23 MR. ALIOTO: I think it would be important to</p> <p>24 -- for Your Honor to hear the complete facts because</p> <p>25 when we settle one of these cases, it's based certainly</p>

<p style="text-align: right;">Page 54</p> <p>1 on the underlying law, the viability of claims. It's  2 based on the statute of limitations. It's based on  3 other things as well, and this is very important. This  4 is -- we're going to talk about notice or maybe we're  5 not going on talk about notice.  6 SPECIAL MASTER: Yes, we are.  7 MR. ALIOTO: We are going to talk about. Well,  8 maybe I can -- I can give a little preview on the notice  9 because it really has to do with the valuation of claims  10 and how we arrived at this settlement. And I know this  11 is all in the papers, but it's -- it's not -- maybe it's  12 not as clear as it can be how this notice program and  13 how the history of this case informed my decision to  14 settle on the basis that we did.  15 And by that I mean this: There have been three  16 nationwide notices in this case: Chunghwa, LG -- the LG  17 was actually a combined notice of the LG settlement and  18 a notice of class certification, but that was a separate  19 nationwide notice. Very similar to this third notice  20 when all the bells and whistles, newspaper, Internet,  21 email, very, very extensive. Three programs, massive  22 notice programs.  23 The direct purchasers, they may have even given  24 more notices because I think they did their settlements  25 differently. They may have had separate settlements,</p>	<p style="text-align: right;">Page 56</p> <p>1 classes not certified, who the claimants are. It's a  2 very comprehensive report by 52 -- by the defendant to  3 52 attorneys general and the Department of Justice.  4 I'll just hand that up to you for your  5 reference.  6 The point I want to make there, Your Honor, is  7 that in this case, there have been nine settlements, so  8 nine defendants, if my math is right, each of those nine  9 defendants sent out 51 CAFA notices. Each defendant  10 notified every state attorney general in the United  11 States, and each defendant notified the Department of  12 Justice. By my calculation that's 459 CAFA notices to  13 the highest ranking law enforcement officials in every  14 state.  15 Where are the attorney generals saying there's  16 viable law and I'm going to bring a case? Where are the  17 attorneys general, people, law enforcement officers, not  18 people with axes to grind or not people with agendas,  19 law enforcement officers, where is the response to those  20 CAFA notices?  21 Well, one response is Mr. Varanini. He's in  22 here, but he doesn't have any problem with the issues  23 that are being raised by these objectors. I just want  24 Your Honor to be aware of these issues. They're out  25 there. They're out in the public domain, notices given</p>
<p style="text-align: right;">Page 55</p> <p>1 and they didn't lump them. And there were at least  2 three notices in the direct case.  3 Now those notices were targeted at direct  4 purchasers, but they were nationwide in scope. There's  5 publication in the Wall Street Journal, there's  6 publication in other publications. There's wide  7 dissemination. So you have six notices.  8 These claims and these cases, and these -- this  9 litigation against these defendants for these products,  10 it's no secret. This has been going on for eight years.  11 There's also reference in the brief to  12 something known as a CAFA notice, and we just kind of --  13 kind of make passing mention to this. This is really  14 not part of our notice program. It's something that  15 defendants are required to do under the Class Action  16 Fairness Act. Every time there's a preliminary approval  17 in one of these indirect purchaser cases, each defendant  18 who has settled and is going to be -- and their  19 settlement is going to be proposed for preliminary  20 approval, they prepare a CAFA notice. This is what one  21 looks like.  22 It's very comprehensive. It sends the attorney  23 general, attorneys general, all 50 of them all of the  24 important documents in the case: the notices, the  25 evidence, the rulings, the classes certified, the</p>	<p style="text-align: right;">Page 57</p> <p>1 to the people that are charged with making these  2 decisions. And when you don't hear anything from any AG  3 and there's no reaction and no -- certainly no contest  4 or no challenge by those law enforcement officers, that  5 really weighs heavily in my decision.  6 Let me add to that this: Let's not forget the  7 importance of opt-outs. Is there someone -- of course  8 this debate is not about, as you say, it's not a law  9 review debate. It's not about these claims and are they  10 viable and is there -- is there law. This is not an  11 academic debate. This is a debate about is there a  12 client out there with a lawyer who wants to bring a  13 claim or is sitting on the sidelines thinking about  14 bringing a claim and we're wiping his rights out.  15 That's the issue.  16 It is highly, highly, highly improbable that  17 someone is going to step forward and assert some claim  18 against these defendants for a global cartel and seek to  19 establish damages on an individual basis and probably  20 even more difficult on a class basis for -- for one  21 state.  22 These kinds of things go into my analysis as  23 lead counsel in consultation with people that I'm  24 working with in the case, which are some of the best  25 people you can possibly work with in these cases. This</p>



<p style="text-align: right;">Page 58</p> <p>1 is what goes into my analysis.</p> <p>2 So is it science? Yes, it's science. We</p> <p>3 review the law. We look at the standing issues. We</p> <p>4 look at statute of limitations issues. We also take</p> <p>5 this pragmatic approach: What is the -- what is the</p> <p>6 risk or what is the chance that after this case has been</p> <p>7 around for eight years with multiple notices, with 459</p> <p>8 notices to the attorneys general and the Department of</p> <p>9 Justice, what's the chance that there is a live claim</p> <p>10 somewhere out there that's being compromised? Almost</p> <p>11 nil, Your Honor. You can't say zero, you can never say</p> <p>12 zero, but I would say it's close to zero as you could</p> <p>13 possibly get.</p> <p>14 SPECIAL MASTER: Okay. So -- but you have to</p> <p>15 notice that the difference between what was done here</p> <p>16 and what was done in LCD, accepting your point that</p> <p>17 claims by -- for any kind of monetary relief by people</p> <p>18 in non-repealer states would be very challenging, would</p> <p>19 be an uphill battle, accepting that, still the</p> <p>20 defendants in this case I take it insisted on a release,</p> <p>21 whereas in LCD those claims, as I remember, were not</p> <p>22 released; that is, whatever claims, weak or strong, that</p> <p>23 people in non-repealer states had for monetary relief,</p> <p>24 were -- were not released in the settlement.</p> <p>25 I don't know if my memory is right, but I think</p>	<p style="text-align: right;">Page 60</p> <p>1 afford him a remedy. That's what we're referring to</p> <p>2 here. Viable. Does the law support the claims if the</p> <p>3 facts bear it out.</p> <p>4 That concept gets lost and gets confused with</p> <p>5 this question of nuisance claims or -- or these un- --</p> <p>6 unproven claims. Nuisance claims. And I -- I don't</p> <p>7 think it's a good idea, and I don't think the class</p> <p>8 action law in fashioning these settlements ought to be</p> <p>9 giving consideration to be giving payments to claimants</p> <p>10 for nuisance claims because sometimes you can get</p> <p>11 payment on a claim if it's not viable.</p> <p>12 So to the extent that's being suggested, and I</p> <p>13 think it is. Look, don't wash those claims out for</p> <p>14 nothing because those people could have asserted these</p> <p>15 claims and they could have gotten something. Well, they</p> <p>16 could have gotten something, but it would have been on a</p> <p>17 nuisance basis. I think that's very important to keep</p> <p>18 that distinction.</p> <p>19 The other -- not to repeat what's in the</p> <p>20 briefs, but recently Judge Tigar in approving the</p> <p>21 settlements in the direct purchaser case, he took note</p> <p>22 of and was very important factors for him the number of</p> <p>23 objectors and the number of opt-outs.</p> <p>24 Here we have a very small number of objectors</p> <p>25 and we've given you some background on those objectors,</p>
<p style="text-align: right;">Page 59</p> <p>1 that's the case.</p> <p>2 MS. KIRKHAM: Yes.</p> <p>3 MR. GOLDBERG: That's correct.</p> <p>4 MR. ALIOTO: Yeah. Now, LCD here --</p> <p>5 SPECIAL MASTER: So here the defendants got</p> <p>6 releases, in LCD they didn't. There could have been a</p> <p>7 thousand reasons for that. And it's -- I don't want to</p> <p>8 go into them but...</p> <p>9 MR. ALIOTO: Well, I don't know that there's a</p> <p>10 thousand, but there are different -- there were</p> <p>11 different reasons because you had claims by AGs in that</p> <p>12 case, actual pending claims that were different from</p> <p>13 claims that were alleged as the classes, and there were</p> <p>14 viable pending claims. But when you come right down to</p> <p>15 it, the question is was it reasonable to settle these</p> <p>16 claims. And I want to just focus on this distinction</p> <p>17 for a minute because this is very important.</p> <p>18 SPECIAL MASTER: Before you take another</p> <p>19 breath, how is the court reporter doing?</p> <p>20 THE REPORTER: I'm okay.</p> <p>21 MR. ALIOTO: Okay. Remember, we throw these</p> <p>22 terms around loosely or I try not to throw these terms</p> <p>23 around loosely, but I want to focus on viable claim.</p> <p>24 Viable claim means you analyze something, and that means</p> <p>25 that if someone can provide the facts, the law will</p>	<p style="text-align: right;">Page 61</p> <p>1 where they're coming from, and a couple of those</p> <p>2 objectors have already dropped their objections. But</p> <p>3 you have a pretty good record on what those objectors</p> <p>4 are about. We have three opt-outs in this case after</p> <p>5 eight years, after multiple notices, after 459 CAFA</p> <p>6 notices.</p> <p>7 SPECIAL MASTER: Were any of those in -- were</p> <p>8 any of those in non-repealer states?</p> <p>9 MR. ALIOTO: I don't know the answer to that</p> <p>10 question.</p> <p>11 SPECIAL MASTER: Okay.</p> <p>12 MR. ALIOTO: But I want to emphasize this</p> <p>13 opt-out mechanism because it's very important. That's</p> <p>14 what protects someone who thinks they have a claim or</p> <p>15 that wants to make new law or wants to go off on</p> <p>16 unproven ground and assert something. They have the</p> <p>17 opportunity to do that, and you can't just pooh-pooh it.</p> <p>18 SPECIAL MASTER: Fair point. I think I know</p> <p>19 the impact of opt-outs.</p> <p>20 MR. ALIOTO: All right. So that's the notice</p> <p>21 component, but it also bears on the -- on the releases.</p> <p>22 This class has had probably unprecedented notice with</p> <p>23 multiple -- with multiple notifications. That's</p> <p>24 important. So how did we come to the -- our conclusion?</p> <p>25 It's all in the brief. The injunctive relief, not</p>

<p style="text-align: right;">Page 62</p> <p>1 viable. They're out of the business. Sure, I could  2 have gone to the defendants and said --  3 SPECIAL MASTER: I get injunctive relief.  4 MR. ALIOTO: Okay.  5 SPECIAL MASTER: The real -- again, just  6 tentatively, I'm not so troubled by the injunctive  7 relief issue. I'm not so troubled by the damage issue.  8 The issue that is more troublesome is this one of  9 equitable monetary relief.  10 MR. ALIOTO: Yes, and Your Honor, I'll just say  11 this -- it's in my papers -- it's completely  12 speculative. There is no claim. There is no client.  13 There is no lawyer. There is no lawsuit.  14 SPECIAL MASTER: Was a claim -- I -- it would  15 be helpful to me, Lauren, if you could see that I get  16 copies of or give me the docket numbers or something so  17 I can easily find copies of the four complaints in this  18 case, because I want to know what -- what was actually  19 alleged. Was there ever a claim either for injunctive  20 relief or equitable relief or damages asserted on behalf  21 of the people in either the non-repealer states or the  22 three omitted repealer states? Was there ever a claim  23 asserted and was it ultimately dismissed? What happened  24 to it?  25 MR. ALIOTO: Yes, it was asserted. It was</p>	<p style="text-align: right;">Page 64</p> <p>1 question --  2 SPECIAL MASTER: Oh, don't do that.  3 MR. DUNCAN: -- and the federal disgorgement  4 claim. So the question is whether there's a split of  5 authority, whether it's in some sense viable. The  6 answer's no. There's not a split of authority. At most  7 it's a hypothetical law review article that someone  8 might want to write.  9 The Illinois Brick is the law of the land.  10 It's been the law of the land for 40 years. If you  11 could end run Illinois Brick simply by filing a federal  12 disgorgement claim, Illinois Brick wouldn't exist, and  13 people would do that. That's the way these cases would  14 be litigated.  15 SPECIAL MASTER: Did any court ever say that?  16 MR. DUNCAN: Absolutely. We've cited one case,  17 a Ninth Circuit case that's controlling that says there  18 is no disgorgement remedy under a private plaintiff  19 under a federal law.  20 SPECIAL MASTER: Okay.  21 MR. DUNCAN: That's in our most recent reply  22 brief. There's a Northern District of California case  23 to the same effect. If you went around the country,  24 every time someone has tried to end run Illinois Brick  25 in this fashion, I'm aware of no case where a private</p>
<p style="text-align: right;">Page 63</p> <p>1 never formally dismissed. It -- it -- it lingered on  2 through the life of the case.  3 SPECIAL MASTER: So if I look in the fourth  4 amended complaint, will I find it?  5 MR. ALIOTO: Yes.  6 MR. COOPER: It's pending is the answer.  7 SPECIAL MASTER: So it's there.  8 MR. COOPER: It's pending.  9 SPECIAL MASTER: It's in the works. It was  10 never --  11 MR. ALIOTO: It's an allegation.  12 SPECIAL MASTER: Right.  13 MS. CAPURRO: There was no injunctive relief  14 class certified at the class certification.  15 SPECIAL MASTER: Right. Okay.  16 MR. COOPER: It was pending.  17 SPECIAL MASTER: Mr. Bonsignore, you're just  18 going to have to chill down there and sit down. I'll  19 get to you.  20 MR. ALIOTO: All right. Your Honor, if you  21 don't mind, I'd just like to have my colleague make just  22 a couple of remarks on this maybe to just sharpen some  23 of these issues up, Mr. Duncan.  24 MR. DUNCAN: Your Honor, just very briefly, I  25 want to cut to the chase on the Illinois Brick</p>	<p style="text-align: right;">Page 65</p> <p>1 class or private plaintiff have been allowed to pursue  2 those claims.  3 SPECIAL MASTER: Okay.  4 MR. DUNCAN: Now the objectors have stated that  5 governments -- it's arguably an open question whether a  6 government body can make use of a disgorgement remedy.  7 Private plaintiff --  8 SPECIAL MASTER: So it's the State of Oregon?  9 MR. DUNCAN: Correct.  10 SPECIAL MASTER: Okay. I thought I heard  11 Ms. Kirkham suggest that there were cases that said no  12 end run with respect to state law.  13 MR. DUNCAN: That's absolutely true also.  14 SPECIAL MASTER: But that there were no cases  15 with respect to the federal Clayton Act, Sherman Act.  16 MR. DUNCAN: That's not true. The cases hold  17 to the contrary.  18 SPECIAL MASTER: And you've cited those in your  19 --  20 MR. DUNCAN: Some of them, and there are others  21 in other circuits. We've cited the Ninth Circuit law.  22 MS. KIRKHAM: Your Honor, this is an  23 interesting point. You're saying that there is a case  24 in which an antitrust price fixing class or plaintiff  25 tried to bring an equitable monetary claim, and the</p>

<p style="text-align: right;">Page 66</p> <p>1 Ninth Circuit said Illinois Brick barred that claim  2 because you cannot end run --  3 MR. DUNCAN: That's not what I said. What the  4 Ninth Circuit held is that there is no disgorgement  5 remedy for a private plaintiff, not a class case. We're  6 not talking about class action. No private plaintiff  7 has a disgorgement remedy under Section 16, period.  8 It's a square hole, and there's -- the law is uniform on  9 that point nationwide.  10 SPECIAL MASTER: Okay. I don't want any more  11 argument about what the case says because we can read  12 it, so -- and make our own judgment for better or worse.  13 MS. KIRKHAM: I also would just like to mention  14 that in LCD Oregon was acting as a private plaintiff.  15 SPECIAL MASTER: Right.  16 MS. KIRKHAM: It had a parens patriae claim.  17 It was not acting --  18 SPECIAL MASTER: Okay.  19 MS. KIRKHAM: You know that.  20 SPECIAL MASTER: I do know that.  21 Okay. I'm thinking of taking a break if we  22 have beaten this issue to death. If there are other  23 people in the room who have something to say on the  24 repealer, you know, non-repealer issue and it's not too  25 long, let's get it out.</p>	<p style="text-align: right;">Page 68</p> <p>1 to him, I became apoplectic, as you noticed. I request  2 only to be able to supplement the record based on his  3 statements. I submitted evidence, unequivocal evidence  4 that Mr. Alioto was aware of plaintiffs in Massachusetts  5 and New Hampshire and Missouri and that he ignored them.  6 He wasn't even aware that he was aware. There were  7 emails to him. After he was reminded, they changed  8 their argument in their reply brief.  9 So in light of the fact that he made an  10 absolute false statement that can be objectively blown  11 up with the allowance of my supplement, I would request  12 that formally.  13 SPECIAL MASTER: Okay. Any requests to  14 supplement the record should be made in writing.  15 Yes, sir?  16 MR. SCARBOROUGH: Yes, Your Honor, again Mike  17 Scarborough for the Samsung SDI defendants.  18 With respect to Massachusetts just, you know,  19 this case goes a long way back. There was a claim on  20 behalf of Massachusetts consumers originally brought in  21 the case. We filed, defendants, multiple motions to  22 dismiss, and we had very able opposition to those  23 motions from lead counsel. Those were hard fought  24 battles, and ultimately I believe it was two different  25 rounds of motions to dismiss, and we had various attacks</p>
<p style="text-align: right;">Page 67</p> <p>1 Mr. Bonsignore, you've been very active down  2 there.  3 MR. BONSIGNORE: As to the allegation that  4 there was a nuisance claim with regard to the three  5 excluded states, there were no nuisance claims involved.  6 The Massachusetts statute allows for treble damages and  7 attorneys fees. The New Hampshire allows for punitive  8 damages and attorneys fees. I'm less familiar with  9 Missouri, but I'll rely on those two.  10 Mr. Alioto seeks to personalize the issues and  11 play the blame game, blaming the victims for not  12 objecting, blaming lawyers for not being present, and I  13 would like to remind him that lead counsel in a  14 nationwide class action is obligated to represent the  15 interests of all class plaintiffs including the named  16 and unnamed plaintiffs in each and every state  17 encompassed within the class they seek to represent.  18 That's Radcliffe, 715 F.3d 1.57 at 1167.  19 SPECIAL MASTER: These points have been made  20 very cogently and repeatedly in the briefs.  21 MR. BONSIGNORE: Okay. Then I would -- then  22 I'll -- I'll just skip over the law. I'm sure you've  23 read it.  24 As to the statements that Mr. Alioto was making  25 that there were no lawyers and no plaintiffs available</p>	<p style="text-align: right;">Page 69</p> <p>1 on that claim mostly on procedural bases. Defendants  2 won. So it was a claim that was litigated extensively  3 and that was thrown out, and defendants prevailed on a  4 motion to dismiss.  5 MR. BONSIGNORE: In response, Your Honor --  6 SPECIAL MASTER: Wait, wait, wait.  7 MR. BONSIGNORE: Okay.  8 SPECIAL MASTER: I just need to do this one by  9 one. As I understand it, Judge Legge finally lost  10 patience and dismissed the claim for failure to make  11 some what he considered necessary allegation. The  12 defendants prevailed. The claim was gone. But Judge  13 Legge said in his -- in his decision this would not bar,  14 you know, the bringing of a valid claim later on.  15 Do I have it right.  16 MR. SCARBOROUGH: I'm not -- again, it's been a  17 while since I looked at these papers.  18 SPECIAL MASTER: That's just what --  19 MR. SCARBOROUGH: I don't know if that last  20 part is correct necessarily, but I don't think it was  21 necessarily an invitation for lead counsel to pursue  22 such a claim.  23 SPECIAL MASTER: Okay.  24 MR. BONSIGNORE: Your Honor, lead counsel is  25 the only person who has the responsibility to do that.</p>

<p style="text-align: right;">Page 70</p> <p>1 And beyond that on that point, it was a procedural issue  2 that could have been corrected in three seconds by the  3 issuance of a subsequent demand letter, and it would be  4 totaling, it would go back, and that would be that.  5 And I will also point to Kayes versus Pacific  6 Lumber Company 51 F.3d 1449 --  7 SPECIAL MASTER: We can't -- if you're citing  8 cases that aren't in your brief, I --  9 MR. BONSIGNORE: No, they're in the brief. I'm  10 just reminding -- I'm highlighting them. Kayes versus  11 Pac. Lumber, 51 F.3d 1449. The responsibility of class  12 counsel to absent class members whose control over their  13 attorneys is limited. And that's the point that I'm  14 making. The class members, lawyers other than lead  15 counsel, and more in this case than any other case I've  16 been in, had no sway whatsoever. He ran it like a  17 dictatorship. We had no control. All we could do was  18 argue and complain.  19 SPECIAL MASTER: All right. Thank you.  20 Ms. Moore, final, final, yes.  21 MS. MOORE: With regards to Massachusetts, Your  22 Honor, an error was made. An error was made two times.  23 It could -- Massachusetts could still have been valued  24 and put in the settlement and was not. And this is a  25 case in LCD. We just -- between Massachusetts and</p>	<p style="text-align: right;">Page 72</p> <p>1 to unearth claims, to create claims?  2 MS. MOORE: Well, actually, even in this case  3 it isn't even relevant because we had plaintiffs. But  4 yes, I do think he should do that, and, in fact, there's  5 law that --  6 SPECIAL MASTER: You had plaintiffs in  7 Massachusetts. Did you have plaintiffs in New Hampshire  8 and Missouri?  9 MS. MOORE: Yes.  10 SPECIAL MASTER: Okay.  11 MS. MOORE: They existed.  12 SPECIAL MASTER: And what happened to them?  13 MS. MOORE: They just were never pursued. They  14 were just abandoned.  15 SPECIAL MASTER: Okay.  16 MR. SCARBOROUGH: Your Honor, just one very  17 quick point to add on Massachusetts. As I recall, there  18 were attempts to cure the defect with the -- it was  19 basically sending a demand letter, and lead counsel did,  20 and whatever associated Massachusetts counsel did try  21 and fix that defect. The defendants argued at that  22 point you couldn't do it. You couldn't fix it. This  23 was not a problem that could be remediated, and the  24 claim had to be thrown out.  25 And as I recall it, that was the view that</p>
<p style="text-align: right;">Page 71</p> <p>1 Missouri, my partial investigation -- I haven't talked  2 to all the aggregators, but there was 41 and a half  3 million dollars distributed in LCD between those two  4 states alone.  5 SPECIAL MASTER: Okay. Well, let me --  6 MS. MOORE: So this is a valuable case that  7 they could have valued and put in the settlement and  8 they chose not to.  9 SPECIAL MASTER: Okay. Is it the duty of lead  10 counsel -- and I know we have a number of people in the  11 room who have served as lead counsel. Is it the duty of  12 lead counsel to go around to every state and phone  13 lawyers and say, you know, go make a claim, go scrounge  14 around and get a class representative. Is that part of  15 the fiduciary duty of lead counsel?  16 No, Mr. Bonsignore.  17 Go ahead.  18 MS. MOORE: Yes, Your Honor, I think he's  19 putative counsel -- he's counsel -- lead counsel is  20 appointed and is given this duty, and it is his  21 responsibility to make sure that these claims are  22 pursued. And I do think he has a right to make sure --  23 SPECIAL MASTER: But is it his duty --  24 MS. MOORE: -- that people are not left out.  25 SPECIAL MASTER: Is it his duty to find claims,</p>	<p style="text-align: right;">Page 73</p> <p>1 prevailed with Judge Legge. So these arguments to the  2 contrary that hey, this was simply send a later demand  3 letter and it can all be fixed is just not true, it's  4 just not what Judge Legge found.  5 SPECIAL MASTER: I'm going to ask and then  6 we're going to take a break. I want someone to tell me  7 dispassionately without a lot of adjectives and  8 invective what happened in New Hampshire and what  9 happened in Missouri.  10 No, I'm going to get another volunteer, Mr.  11 Bonsignore.  12 MS. MOORE: The claims were never filed. There  13 was never a claim filed --  14 SPECIAL MASTER: Okay. I'm going to ask --  15 MS. MOORE: -- by lead counsel.  16 SPECIAL MASTER: Ms. Moore, thank you.  17 Go ahead.  18 MR. ALIOTO: Thank you, Your Honor. From lead  19 counsel's perspective, you can only bring claims for  20 those people who stepped forward and wanted to assert a  21 claim. We gathered all of the claims, all of the  22 complaints that were filed at the institution of the  23 case. We reviewed those. Some -- there was an  24 extensive vetting process that went on for months. Some  25 claimants survived that process. Others didn't.</p>

<p style="text-align: right;">Page 74</p> <p>1 There were also discussions as the case went on  2 to -- to the later years of the case. There were  3 discussions about other class representatives,  4 discussions with lawyers who thought they had clients,  5 and those were vetted up the line and eventually to me,  6 and decisions were made as to the viability of  7 plaintiffs.</p> <p>8 SPECIAL MASTER: So what happened in New  9 Hampshire and Missouri?</p> <p>10 MR. ALIOTO: There was never any plaintiff that  11 I -- certainly I didn't represent anyone, and no  12 plaintiff in Missouri was ever brought to my attention  13 as being out there and wanting to press a suit. That is  14 the absolute fact.</p> <p>15 It was, as is the case in a lot of these  16 multistate cases, sometimes there are not claimants for  17 these states. This is a big responsibility, Your Honor,  18 to step up in one of these cases. You know what goes  19 into that.</p> <p>20 SPECIAL MASTER: Okay. What about New  21 Hampshire?</p> <p>22 MR. ALIOTO: I don't believe there was ever a  23 client proffered. Mr. Bonsignore has mentioned  24 something in his papers about late in the game that  25 there was a -- he had someone and someone was ready to</p>	<p style="text-align: right;">Page 76</p> <p>1 Mr. Alioto, you didn't do this and Mr. Alioto, you  2 didn't do that, well, we did \$576 million worth of right  3 things. And that's what we're trying to get approved.  4 And this is -- with all due respect to these objectors,  5 this is just -- let me say it's a side show. Thank you.</p> <p>6 SPECIAL MASTER: Okay. We're going to take a  7 break now for like ten minutes, and then we'll come back  8 and deal with the other issues. Thank you.</p> <p>9 (Recess 11:34 a.m. to 11:47 a.m.)</p> <p>10 SPECIAL MASTER: I'd like to move on to the  11 notice issue. If anybody has anything more to say on  12 this repealer issue, you can say it at the end when I  13 give you a chance to raise any issues that haven't  14 otherwise been raised. But we need to cover the  15 waterfront here, so I'd like to move on to the issue of  16 whether the notice was adequate again.</p> <p>17 I've read the briefs, I understand the problems  18 that have been raised with the notice. I understand the  19 responses of lead counsel and the declaration -- various  20 declarations of Mr. Fisher. So, you know, I think I'm  21 pretty well up to speed on this, but I'd like to hear --  22 give you a chance to say anything that needs saying.</p> <p>23 Anyone from the objectors side like to be heard  24 on this issue?</p> <p>25 MR. SCARPULLA: Francis Scarpulla, Your Honor.</p>
<p style="text-align: right;">Page 75</p> <p>1 go. I viewed that with extreme caution because when you  2 make a decision like that to put somebody forward for a  3 state, it's very important. It's not only important for  4 that state, it's important for the whole case.</p> <p>5 SPECIAL MASTER: I remember your briefing on  6 this point now.</p> <p>7 MR. ALIOTO: The statute had run. The simple  8 answer is without the invectives, the statute had run at  9 the time he brought that up.</p> <p>10 SPECIAL MASTER: Okay.</p> <p>11 MR. ALIOTO: But can I make one point without  12 invective or adjective? We have quite a different view  13 about abandoning and not representing and, you know,  14 sloughing people off. But, you know, the simple answer  15 to that is Ms. Moore and Mr. Bonsignore and all these  16 other people after the fact, you got the papers. You  17 know what classes are represented and are not  18 represented. Go out to the federal courthouse. File a  19 complaint. The complaint will be transferred into this  20 district, and we would love nothing more for them to  21 have done that at the time.</p> <p>22 I can't dictate to them. If they had a client  23 and they felt strongly about this, file a case, it will  24 be transferred in, and we'll deal with it. But after  25 the fact, you know, after the money is in the bank and</p>	<p style="text-align: right;">Page 77</p> <p>1 I think we said it pretty much in our brief, and I am  2 not going to repeat that. We just would urge that Your  3 Honor may wish to consider hiring an independent expert  4 to opine on it.</p> <p>5 Now I've done a hundred-plus notices, and so  6 when you see one where the only evidence -- where the  7 only hard evidence you have is a reach of 58 percent,  8 then there is a problem, especially since as Mr. Fisher  9 points out, if you use the early years, the class  10 members were between six years old at the start of the  11 period and 18 at the end of it if you use his early  12 years. I don't even think they had -- even at the end  13 of the period, 18 year olds don't have the right to form  14 contracts. Put that aside.</p> <p>15 If you use his later years, then it's 12 to 22.  16 I'm sorry, 10 to 22. Those are -- that's the ages of  17 the people that he targeted during the -- during the  18 period of the -- of the price fixing.</p> <p>19 And again, those TVs as -- as the LCDs came  20 into the market, there was a great decline in the sales  21 of CRTs, and they were being bought by individual family  22 units that didn't have a lot of money because they were  23 much cheaper than the LCDs. And to target someone who  24 had income of 60,000 or more misses a whole group of  25 those individual class members.</p>



<p style="text-align: right;">Page 78</p> <p>1 And one thing that Your Honor may ask for,  2 which I have not been able to get, I don't know the  3 number of individuals, human beings who have made  4 claims, and that's something that I would respectfully  5 suggest Your Honor may wish to find out.  6 Now we know that there are the big corporations  7 that put in claims, but the question is how many natural  8 persons put in claims. So I'm not going to repeat  9 anything else in the brief.  10 SPECIAL MASTER: Okay. You said the only hard  11 evidence is that the reach was 58 percent. I mean Mr.  12 Fisher says it was 83 percent. Why is that not hard  13 evidence?  14 MR. SCARPULLA: Because he's saying -- he's  15 saying I think our Internet reached so many people, but  16 there's nothing -- you have no hard evidence that  17 anybody saw it or that they did anything about it.  18 SPECIAL MASTER: So I don't know how many  19 clicks and so on?  20 MR. SCARPULLA: You have no idea.  21 SPECIAL MASTER: All right.  22 MR. SCARPULLA: And in fact, Your Honor, they  23 had to come to the DRAM database and get that database  24 from us to send out supplemental notices because the  25 notice program was so -- was so flawed.</p>	<p style="text-align: right;">Page 80</p> <p>1 preliminary approval stage. Everything that was going  2 to be done notice-wise was vetted then. It was done.  3 There's an extensive record at this point about  4 everything that was done and the effectiveness of it.  5 To speak briefly to the point that there's no  6 hard evidence about the reach statistic, that's just  7 wrong. I mean, Mr. Fisher's declaration includes  8 exhibits that say, you know, for the digital outreach  9 precisely what was done, the number of impressions.  10 Google, for example. Google is the search engine.  11 There were Google banner ads done throughout the Google  12 ad network. Google search results, paid search results  13 were returned. This is just one example of the digital  14 outreach. Two hundred million plus impressions on that  15 kind of thing. And the data is in Mr. Fisher's  16 declaration.  17 SPECIAL MASTER: By impressions, what do you  18 mean?  19 MR. DUNCAN: Well, by impressions, that means  20 that when something in the Google network, in the Google  21 ad network website is visited, there's a banner ad that  22 someone sees. Now whether they actually click on that,  23 you don't know. We don't have that data. But you know  24 that someone saw the banner ad within the network. And  25 so that's what the impression data does. And there's a</p>
<p style="text-align: right;">Page 79</p> <p>1 SPECIAL MASTER: Good. Anyone else have  2 anything to add on this issue?  3 Mr. Alioto, why would it not be interesting to  4 know this data: How many claims have been submitted,  5 what's the dollar volume, what's the -- where are they  6 from, how many are natural individuals, how many are  7 from the state of California to satisfy the attorney  8 general? Why would it not be interesting to know that  9 and evidently has not been made available?  10 MR. ALIOTO: Yes, thank you, Your Honor. Mr.  11 Duncan and Mr. Novak are going to be responding to those  12 notice issues.  13 SPECIAL MASTER: Okay. Mr. Duncan.  14 MR. DUNCAN: Sure. Your Honor, Matthew Duncan  15 from Fine Kaplan again.  16 I think -- I think in a vacuum that information  17 will be interesting. The problem -- the issue is that  18 the process is ongoing. Claims are still -- many were  19 received at the end. The claims administrator is still  20 processing that and then certainly that information is  21 going to be known to the court. The issue is that it's  22 not -- it's not germane to settlement approval and  23 whether the standard for notice is met ex ante.  24 So bear in mind, the extent to which all of  25 these issues were considered exhaustively at the</p>	<p style="text-align: right;">Page 81</p> <p>1 long list of digital outreach that was done. We have  2 the impression data for all of that. And then what Mr.  3 Fisher does is feed that data into the comScore system,  4 which is what marketing professionals and everyone else  5 uses to do this, to calculate the reach.  6 So at the end of the day, Mr. Fisher has  7 explained what he did. He's given you the data that  8 went into comScore and then the comScore is the upshot  9 of all of that. And nobody has really -- it's the way  10 it's done, and nobody has shown otherwise in any of the  11 projections.  12 So the reach is the reach. It's well within  13 the standard. It's -- it's best -- best practicable  14 notice for all of those reasons, and we think the record  15 is more than robust to find the notice requirements have  16 been met.  17 SPECIAL MASTER: So when -- when would you  18 expect to provide this information to the court assuming  19 I don't tell you to do it sooner at the -- at the time  20 the final papers are filed on the motion for final  21 approval?  22 MR. DUNCAN: I think Mr. Alioto probably knows  23 a little bit more about this than I do. But  24 conceptually, I mean, that's part of the claims process  25 reporting that would happen at the allocation phase.</p>

<p style="text-align: right;">Page 82</p> <p>1 MR. ALIOTO: We intend to be doing that, 2 although there is this issue raised by the state of 3 California about extending the deadline, so to the 4 extent it's extended, you won't have it complete until 5 that deadline runs. 6 SPECIAL MASTER: But can't we know how things 7 stand now? I mean, I understand the argument that a 8 court has to evaluate a notice program ex ante before it 9 knows how it's actually going to work and make a 10 decision as to whether it's the best practicable. And 11 the court here has done that. But gosh, just common 12 sense tells you it might be nice to see what the results 13 are. 14 MR. ALIOTO: I will check with the 15 administrator today and report on where he is and 16 whether and when that information can be made available. 17 SPECIAL MASTER: And if it's robust, I should 18 think you'd be the first one to be trotting it out 19 there. 20 Okay. Anything else on notice? Let's see if I 21 have any questions. 22 MR. COOPER: Your Honor, I assume that our 23 suggestion about an independent expert is something 24 you're considering? I mean, I'm not asking for a 25 response. I just -- you haven't rejected it?</p>	<p style="text-align: right;">Page 84</p> <p>1 SPECIAL MASTER: Or the absence of flaws. If I 2 hire an independent expert -- 3 MR. SCARPULLA: -- or absence of it. 4 SPECIAL MASTER: -- not one that you suggested, 5 if I hire an independent expert -- 6 MR. SCARPULLA: Correct. 7 SPECIAL MASTER: -- he might say or she might 8 say everything is dandy. 9 MR. SCARPULLA: You're absolutely right. 10 SPECIAL MASTER: Is that correct? 11 MR. SCARPULLA: That's absolutely correct. And 12 then you -- Mr. Fisher was a former lawyer who didn't 13 make it in the practice of law and decided to go into 14 this business. You can't do -- 15 SPECIAL MASTER: We all make life choices. 16 MR. SCARPULLA: You can't do nationwide notice 17 of any significance for \$1.5 million. That's not 18 possible. 19 SPECIAL MASTER: I noted that figure. 20 MR. SCARPULLA: It would cost at least 4 or 5 21 million to get the kind of reach to 80 or plus percent, 22 and that's the whole point of having an independent 23 expert. 24 MR. COOPER: I would just say, Your Honor, that 25 I think you put your finger on it. This is an</p>
<p style="text-align: right;">Page 83</p> <p>1 SPECIAL MASTER: I know -- I have not rejected 2 it. 3 MR. COOPER: Right. 4 SPECIAL MASTER: I mean -- say I were to do 5 that. What -- what different information would they -- 6 I mean I guess they might provide an opinion that's 7 different than Mr. Fisher's opinion, but then I just 8 have a battle of experts, and how has the ball been 9 advanced? 10 MR. DUNCAN: Your Honor, that's a good point 11 and it is -- Mr. Fisher is an expert. He's done this 12 many times. His CV is in the record. Everything he's 13 done is in the record, and all of this would lead at 14 most to quibbling about how a different expert might do 15 something slightly differently at the margin. And 16 that's not the standard for whether notice is 17 reasonable. The standard is whether it's reasonable on 18 its own terms, not whether different lawyers might have 19 done something differently on margin or whatever. 20 SPECIAL MASTER: Okay. Mr. Scarpulla or Mr. 21 Cooper, or you can both speak at once. 22 MR. SCARPULLA: Yes, Your Honor, the reason 23 that you -- the reason for an independent expert is so 24 that he or she can tell you the flaws in the notice 25 program that Fisher -- Fisher is --</p>	<p style="text-align: right;">Page 85</p> <p>1 independent expert, someone that works for the court 2 who's not in an advocacy position. It's not like you 3 get two sides putting up their own experts who are 4 advocating for the two sides. This is someone who would 5 evaluate it, and give you an independent view. And I 6 think that's a totally different thing. You'd have 7 to -- they might say it was fabulous and put an end to 8 all these questions about notice. 9 SPECIAL MASTER: Or they might be competitors 10 of Mr. Fisher and love to get a whack at him, you know, 11 so... 12 MR. COOPER: Well, I guess that's a theoretical 13 possibility but... 14 MR. ALIOTO: Your Honor, let's not forget, when 15 we were working on the schedule, and the objectors 16 needed all of this time and this elongated schedule, 17 there were statements made by Mr. Scarpulla that he 18 needed time to retain an expert. Well, he got the time, 19 but he has not retained an expert. Instead, he's come 20 in and said well, we're not going to retain anybody. We 21 want you to go get an independent expert. There's no 22 basis on this record to do that, especially after he 23 initially indicated that he was going to pursue that 24 himself. 25 SPECIAL MASTER: Okay. Mr. Bonsignore?</p>

<p style="text-align: right;">Page 86</p> <p>1 MR. BONSIGNORE: Yes. Mr. Alioto is entitled  2 to an opinion, but so is Mr. Scarpulla and the other  3 objectors. It was one option to hire the excluded  4 plaintiffs' reviewer. The smarter option is to have the  5 court hire their own because then it's absolutely  6 independent and it wipes out the argument oh, it's a  7 battle of the experts. That's gone. So you're  8 presented only with -- I'll summarize my -- so you're  9 presented only with someone who you hired and the  10 argument that it's a battle of the experts is entirely  11 eliminated. Thank you.  12 SPECIAL MASTER: All right. The next issue  13 that is on my mind is this -- the impact of the Chunghwa  14 settlement. And I confess to be confused as to what the  15 objectors are really saying is the problem created for  16 this settlement by the terms of the Chunghwa settlement.  17 I forget who -- whether it was Ms. Moore who -- go  18 ahead, Mr. Cooper --  19 MR. COOPER: I think --  20 SPECIAL MASTER: -- or Ms. Kirkham. Either  21 one.  22 MR. COOPER: Go ahead.  23 MS. KIRKHAM: We didn't say that it was a  24 problem for the settlement approval. We said it was a  25 problem for the approval of the plan of allocation</p>	<p style="text-align: right;">Page 88</p> <p>1 there's \$10 million in California's pot and \$7 million  2 in Arizona's, or \$5 million or -- well, some other  3 state. Arizona is not a good, actually, example.  4 MR. COOPER: It also includes Illinois, Oregon  5 and Washington.  6 MS. KIRKHAM: Right, it does include Illinois,  7 but the point I'm trying to make --  8 MR. COOPER: It generally includes  9 distributions to Illinois, Washington and Oregon who are  10 excluded --  11 (Reporter clarification).  12 The distribution in the judgment includes  13 payments to Illinois, Oregon and Washington AGs who are  14 not in these settlements. But there is no provision for  15 that coming out. And also that class, that settlement  16 class includes resellers of product.  17 SPECIAL MASTER: So what should we do?  18 MR. COOPER: I think it's a problem.  19 SPECIAL MASTER: Okay.  20 MR. COOPER: You have to re-notice.  21 SPECIAL MASTER: Thank you. But what do I do  22 about it?  23 MR. COOPER: Well, you disapprove it, is what  24 you do. You've got to re-notice people in other states.  25 You've got to carve out the money. You have to tell</p>
<p style="text-align: right;">Page 87</p> <p>1 because the plan of allocation ignores the existence of  2 the Chunghwa settlement. And the Chunghwa settlement  3 has some very specific terms in it about how the money  4 is to be paid out and to whom. So that was what we  5 raised.  6 We simply said that it was -- that the problem  7 was that the Chunghwa settlement, which is final,  8 provides a plan of allocation. That plan of allocation  9 is not incorporated into this plan of allocation, and  10 this plan of allocation would -- is inconsistent with  11 that plan of allocation.  12 SPECIAL MASTER: How?  13 MS. KIRKHAM: Okay. The Chunghwa --  14 THE WITNESS: I know your brief said this but I  15 --  16 MS. KIRKHAM: That's okay. I can go through it  17 fairly quickly.  18 The Chunghwa allocation provides for the  19 settlement money to be divided up among certain states  20 with -- proportionate to census data. So they would --  21 so it creates pots that are fixed amounts. Then claims  22 would be solicited. So -- as opposed to a pro rata  23 among all of the people that the plan of allocation  24 deemed entitled to receive money, which is the current  25 plan, you can see there'd be a real difference if</p>	<p style="text-align: right;">Page 89</p> <p>1 people what's happening. I just don't -- you can't just  2 ignore it.  3 SPECIAL MASTER: Okay. I'm sorry to be  4 plodding here. But to whom do we have to give notice  5 now?  6 MR. COOPER: Well, if the class includes  7 resellers, you have to now have a notice which says that  8 resellers can claim against this pie.  9 SPECIAL MASTER: Okay. Because the Chunghwa  10 settlement includes payments, potential payments to  11 resellers --  12 MR. COOPER: Right.  13 SPECIAL MASTER: -- whereas this one doesn't.  14 MS. KIRKHAM: Doesn't. And the Chunghwa notice  15 told resellers they would be paid at a later date.  16 SPECIAL MASTER: Okay. So let me see if I get  17 it. You're saying there are two significant differences  18 between the allocation plan in Chunghwa and this  19 allocation plan. One is resellers get money from  20 Chunghwa. They don't here.  21 Number two is there's a different formula for  22 distributing money state by state in Chunghwa than the  23 pro rata plan that is proposed here.  24 MS. KIRKHAM: Yes, yes.  25 SPECIAL MASTER: I got it.</p>



<p style="text-align: right;">Page 90</p> <p>1 Mr. Alioto.</p> <p>2 MR. ALIOTO: Yes. There's no inconsistency.</p> <p>3 First of all, with respect to resellers, the notice</p> <p>4 that's in our brief, the notice is quite clear that</p> <p>5 because of the relatively small amount of money paid</p> <p>6 under the Chunghwa settlement, that would be the</p> <p>7 settlement for the ten million dollars plus the proffer.</p> <p>8 Because of that small amount, it would not have been</p> <p>9 practicable to actually allocate money. And the notice</p> <p>10 recites -- I'll try to find that cite in the brief, but</p> <p>11 -- it's in our most recent brief. We cite to the notice</p> <p>12 that says resellers, you may not get money. And that</p> <p>13 was put in there because of the small amount of the</p> <p>14 settlement.</p> <p>15 And so there's never been any expectation or</p> <p>16 promise that they would get money as part of that</p> <p>17 Chunghwa settlement.</p> <p>18 SPECIAL MASTER: But I'm being told there was</p> <p>19 final approval of the Chunghwa settlement, and in that</p> <p>20 settlement was a provision for giving money to</p> <p>21 resellers.</p> <p>22 MR. ALIOTO: Well, I would have to see that.</p> <p>23 SPECIAL MASTER: Isn't that a final judgment?</p> <p>24 MR. ALIOTO: Well, that's -- no, I think what</p> <p>25 they're saying is in that -- they're referring to orders</p>	<p style="text-align: right;">Page 92</p> <p>1 you're not getting any money?</p> <p>2 MR. ALIOTO: Yeah, and I'm not so sure that</p> <p>3 there is any inconsistency.</p> <p>4 SPECIAL MASTER: Well, resellers get money,</p> <p>5 resellers don't get money. That sounds like an</p> <p>6 inconsistency.</p> <p>7 MR. ALIOTO: Yeah, but what are they referring</p> <p>8 to -- I mean, I'm going on arguments that have been</p> <p>9 made. What are they -- I'm trying to respond to an</p> <p>10 argument, but I'm not exactly sure what the argument is.</p> <p>11 The argument is that there was something in the final</p> <p>12 judgment in the --</p> <p>13 SPECIAL MASTER: In the -- I am being -- wait.</p> <p>14 Okay. Mr. Scarpulla.</p> <p>15 MR. SCARPULLA: Your Honor, there was a final</p> <p>16 judgment approving the settlement with Chunghwa which</p> <p>17 provided for a payment to resellers. It's in there.</p> <p>18 It's final.</p> <p>19 SPECIAL MASTER: Okay. All right.</p> <p>20 MR. SCARPULLA: Period. And then there was</p> <p>21 also a provision in there which provided that the money</p> <p>22 would be divided certain percentages by state. That's</p> <p>23 gone too.</p> <p>24 SPECIAL MASTER: Okay.</p> <p>25 MR. ALIOTO: All right.</p>
<p style="text-align: right;">Page 91</p> <p>1 that there was a provision to give money to states.</p> <p>2 There's two issues here. One is resellers.</p> <p>3 That issue, I submit, is very straightforward. Because</p> <p>4 of the small amount, we recognized at the time that</p> <p>5 there might not be money to distribute.</p> <p>6 SPECIAL MASTER: Well, it may be a small</p> <p>7 amount, but we have the small issue of a final judgment</p> <p>8 that says they get money.</p> <p>9 MR. ALIOTO: I don't believe that's recited in</p> <p>10 the final judgment, Your Honor. It's been quite a while</p> <p>11 since I've seen that, and we'll check that. But the</p> <p>12 notice, the document that actually went to class members</p> <p>13 said you're not -- you may not get anything. That's</p> <p>14 quite clear, and that's cited in our brief. Now whether</p> <p>15 there's some -- some mention to the contrary in the</p> <p>16 judgment, I just don't know from memory, but I will</p> <p>17 check that. The notice, the crucial document that was</p> <p>18 sent to the class member that they read and relied on</p> <p>19 had that provision.</p> <p>20 SPECIAL MASTER: Okay. So your -- your</p> <p>21 position is that any inconsistency with respect to the</p> <p>22 treatment of resellers or other class members in</p> <p>23 Chunghwa and this case is cured by the "new</p> <p>24 comprehensive," in quotes, notice, that you gave in this</p> <p>25 case, and that notice in effect says oops, actually</p>	<p style="text-align: right;">Page 93</p> <p>1 SPECIAL MASTER: Let's be practical here. We</p> <p>2 don't want a \$10 million tail to wag the \$576 million</p> <p>3 dog. So this is a problem that I would like to find a</p> <p>4 way to cure and not have it be a reason to foul up a</p> <p>5 settlement.</p> <p>6 MR. SCARPULLA: But that's a big problem, Your</p> <p>7 Honor, because it's constitutional issues of due</p> <p>8 process.</p> <p>9 SPECIAL MASTER: I get it. If it's a problem,</p> <p>10 it's a problem.</p> <p>11 MR. ALIOTO: And what that settlement provided</p> <p>12 for -- and here's -- I think I get the gist of the</p> <p>13 argument. When we sought approval of that Chunghwa</p> <p>14 settlement, certain attorneys general appeared. They</p> <p>15 got the notice, and they got the CAFA notice, and they</p> <p>16 stood up for their rights.</p> <p>17 And Washington said we want to go our own way.</p> <p>18 And Oregon and Illinois said we want to go our own way</p> <p>19 in the future, but thanks a lot for getting this</p> <p>20 settlement and we should get this money. We -- and that</p> <p>21 issue was tee'd up in front of Judge Legge. And Judge</p> <p>22 Legge ruled yes, they're entitled as AGs to that money,</p> <p>23 and the judgment and the preliminary approval order</p> <p>24 recited that. That was a ruling by Judge Legge. Not a</p> <p>25 contractual arrangement or deal, it was a -- it was a</p>

<p style="text-align: right;">Page 94</p> <p>1 contested matter and a ruling by the judge.  2 I think where the confusion comes in, Your  3 Honor, is the amount of the settlement that was  4 allocated to Illinois and Oregon was based on a  5 population allocation. That population allocation is  6 set out in the order, and it says Illinois and Oregon  7 are going to get X amount based on this population  8 calculation. It was like setting forth the background  9 of the calculation.  10 What the objectors are saying is that that  11 background of the allocation to Illinois and Oregon,  12 that meant that all those other states had to get money.  13 That's not the case. The listing of all those other  14 states was just for the purpose of showing how we  15 arrived at the allocation figure from Washington and  16 Oregon. No inconsistency. Money is going to be paid to  17 those states. Matter of fact, I just spoke with Blake  18 Harrop (phonetic) the other day, a couple of days ago  19 confirming that with him. That settlement is over, it's  20 done, and those terms are going to be honored as part of  21 this larger package.  22 SPECIAL MASTER: What do you mean they're going  23 to be honored?  24 MR. ALIOTO: There's a provision in the  25 Chunghwa settlement per Judge Legge's ruling that a</p>	<p style="text-align: right;">Page 96</p> <p>1 SPECIAL MASTER: But how -- if there was a  2 final approval by the district court of a settlement  3 that provided money going to resellers, how do we ignore  4 that?  5 MR. ALIOTO: Well, I'm going to have to check  6 that final judgment, Your Honor.  7 MR. COOPER: Well, the class includes  8 resellers, Your Honor. The settlement class includes  9 resellers.  10 MR. ALIOTO: I will say --  11 SPECIAL MASTER: Did you have -- you're shaking  12 your head. Do you have something of wisdom to add? No?  13 All right.  14 MR. ALIOTO: Keep in mind that this is --  15 SPECIAL MASTER: Look, this is a small issue in  16 magnitude, but it's troubling, and I don't have any of  17 the -- I mean, they're all in the record. But nobody  18 has really thoroughly briefed this. Nobody has given me  19 a stack of material I should look at like the language  20 of the Chunghwa settlement, the -- the orders approving  21 it and so on. And there's not a lot of time between now  22 and January 15.  23 MR. COOPER: We'll pull them together and send  24 them to you, Your Honor. We'll send the list that we're  25 going to send to Mr. Alioto in advance of sending it to</p>
<p style="text-align: right;">Page 95</p> <p>1 certain -- certain percentages of money must be paid to  2 the state of Illinois and the state of Oregon. And  3 those payments will be made because that was part of  4 that settlement approval.  5 SPECIAL MASTER: So you will carve out an  6 exception to the pro rata distribution to take care of  7 Oregon and Illinois?  8 MR. ALIOTO: Precisely.  9 MR. COOPER: And the amount of money that will  10 be distributed pro rata will be the amount of money you  11 think is involved less the amounts that go to those AGs.  12 So all the notice that says this is the amount you're  13 going to share pro rata is incorrect by the amount. It  14 may not be a large amount, but it's incorrect, and  15 there's been nowhere in all the presentations about  16 this, any acknowledgment until we brought it up of the  17 problems with what exists with regard to the commitments  18 made in connection with the Chunghwa settlement.  19 Look at the -- look at the order of  20 preliminarily approving the Chunghwa settlement. That's  21 where the chart of states and percentages is attached.  22 SPECIAL MASTER: What about resellers, Mr.  23 Alioto? What --  24 MR. ALIOTO: There will be -- there's no  25 payment contemplated to the resellers, Your Honor.</p>	<p style="text-align: right;">Page 97</p> <p>1 you in case he wants to add something to the list.  2 MS. MOORE: Just a point that I believe now  3 that everyone can make a claim, there's no place on the  4 website to actually make a claim for resellers.  5 SPECIAL MASTER: Yeah, I mean, resellers have  6 been excluded from this settlement. I understand.  7 Yes, Mr. Bonsignore?  8 MR. BONSIGNORE: Very briefly Your Honor, you  9 might find 55 F.3d 768, 797. It's a third circuit case  10 cert. denied, 516 U.S. 824 of interest and when you're  11 evaluating this specific issue.  12 SPECIAL MASTER: Give me the name of the case.  13 MR. BONSIGNORE: In re General Motors Corp  14 Pickup Truck Fuel Tank Products Liability Litigation.  15 SPECIAL MASTER: And is that cited in your  16 brief somewhere?  17 MR. BONSIGNORE: Yes.  18 SPECIAL MASTER: Thank you.  19 Sir.  20 MR. ST. JOHN: This strikes me as someone  21 representing a client who is potentially impacted by  22 this as an unforced error by class counsel. And I agree  23 with Your Honor that it shouldn't wag the dog. I think  24 the solution is that the party that's responsible for  25 the unforced error should pay for it. Deduct the cost</p>

25 (Pages 94 - 97)

<p style="text-align: right;">Page 98</p> <p>1 from class counsel's fees.</p> <p>2 SPECIAL MASTER: Deduct what costs?</p> <p>3 MR. ST. JOHN: Whatever additional notice and</p> <p>4 whatever it costs to fix payments for resellers and</p> <p>5 payments to the states in question. Mr. Alioto made the</p> <p>6 mistake. There's a term for that, but Mr. Alioto should</p> <p>7 be responsible for fixing it. And you can fix it</p> <p>8 without -- and resolve these problems.</p> <p>9 MR. ALIOTO: We'll determine that when Your</p> <p>10 Honor has the full records and you can make that</p> <p>11 determination.</p> <p>12 SPECIAL MASTER: All right. Before we leave,</p> <p>13 I'll set up an additional briefing schedule on this</p> <p>14 issue.</p> <p>15 Now, that brings us to Mr. Varanini. And you</p> <p>16 want to extend the claim deadline?</p> <p>17 MR. VARANINI: Yes. But --</p> <p>18 SPECIAL MASTER: And I am told by your</p> <p>19 colleagues on the other side that doing so will create</p> <p>20 all sorts of claims of disparate treatment. California</p> <p>21 residents will be claimed to be given a longer time to</p> <p>22 make claims than other people and so on. Before you get</p> <p>23 into your argument, let me ask you: What happens if the</p> <p>24 court says no? What happens down in the California</p> <p>25 state court if the court says no, we're not going to</p>	<p style="text-align: right;">Page 100</p> <p>1 sort of the residue that can help those folks who don't</p> <p>2 file claims as far as injunctive relief. And so we</p> <p>3 agreed if we can persuade defendants to insert language</p> <p>4 that would make it crystal clear, even though this has</p> <p>5 always been our position, that we were not out there to</p> <p>6 supplant or replace class claims.</p> <p>7 There's a price for that. Because we can't</p> <p>8 give defendants exclusivity. We can't say okay, we can</p> <p>9 give you a release which would eliminate Mr. Alioto's</p> <p>10 claim 'cause we don't do that. They're not going to pay</p> <p>11 us a lot of money because Mr. Alioto is the one who can</p> <p>12 come in there and say I've got these big claims.</p> <p>13 They're worth a lot of money. This is -- this is what I</p> <p>14 bring to the table.</p> <p>15 So we didn't negotiate for the kinds of sums of</p> <p>16 money that would allow us to run a direct recovery</p> <p>17 program where people could make claims against our pot,</p> <p>18 even leaving aside the other claims that we have in our</p> <p>19 case, because we do have other claims aside from natural</p> <p>20 people. So that's what we relied on.</p> <p>21 Traditionally the way we work is we come in at</p> <p>22 the allocation stage, like we have here. Usually this</p> <p>23 is behind the scenes because we have joint settlements.</p> <p>24 Here it's not behind the scenes, so this makes it</p> <p>25 different. But we come in, and we give advice on</p>
<p style="text-align: right;">Page 99</p> <p>1 extend the deadline? Sorry, deadline is a deadline.</p> <p>2 MR. VARANINI: Well then --</p> <p>3 SPECIAL MASTER: What do you do practically?</p> <p>4 MR. VARANINI: Practically that's a difficult</p> <p>5 question because we have to figure out what to tell</p> <p>6 California and actual people.</p> <p>7 SPECIAL MASTER: They now have settled or --</p> <p>8 their parens patriae --</p> <p>9 MR. VARANINI: Yes.</p> <p>10 SPECIAL MASTER: -- their claims that you</p> <p>11 brought on their behalf. Where do they make claims?</p> <p>12 MR. VARANINI: Well, they can't. We didn't --</p> <p>13 this is set out in our briefing, so if Your Honor</p> <p>14 doesn't mind my summarizing the briefing, that's fine,</p> <p>15 but I would encourage Your Honor to look at it.</p> <p>16 When we settled these cases, we did so based on</p> <p>17 having had discussions with the indirect purchaser</p> <p>18 plaintiffs trying to fix a situation that occurred</p> <p>19 within early settlement. And as part of that, the</p> <p>20 amounts that we negotiated for were done with the view</p> <p>21 that the indirect purchaser plaintiffs were out there.</p> <p>22 They were in federal court. They were ahead of us going</p> <p>23 to trial.</p> <p>24 Traditionally, you know, private plaintiffs are</p> <p>25 good at getting monetary relief, and we tend to focus on</p>	<p style="text-align: right;">Page 101</p> <p>1 allocation. We say okay, we as AGs really care about</p> <p>2 natural people. Not to say private plaintiffs don't,</p> <p>3 but we really care about them. They're our citizens,</p> <p>4 they're going to complain to us if there's a problem.</p> <p>5 They're not going to go complain to you.</p> <p>6 SPECIAL MASTER: Might even vote you out of</p> <p>7 office.</p> <p>8 MR. VARANINI: Right. They might vote her out</p> <p>9 of office or hypothetically they might decide not to</p> <p>10 promote her to the next office that's coming up. So we</p> <p>11 take --</p> <p>12 MR. GOLDBERG: We have that on the record.</p> <p>13 MR. VARANINI: I'm aware of that. I hope the</p> <p>14 general looks favorably on me for having said it. But</p> <p>15 be that as it may, we're the ones who are going to get</p> <p>16 the criticism. So when we send out a notice that would</p> <p>17 say -- and we can't because we don't agree with it --</p> <p>18 that would say California natural people, you can't file</p> <p>19 claims. You're going to have to live with what we can</p> <p>20 give you on cy pres, meaning sort of this indirect</p> <p>21 relief where we give money for the indirect benefit of</p> <p>22 the class. Just making sure there's a complete record.</p> <p>23 I know Your Honor is very well aware of this. We're the</p> <p>24 ones who are going to get criticized. And this is -- we</p> <p>25 negotiate these settlements in reliance on this</p>

<p style="text-align: right;">Page 102</p> <p>1 understanding that we tried to implement to move 2 forward. 3 SPECIAL MASTER: But let me just -- 4 MR. VARANINI: Sure. 5 SPECIAL MASTER: All the natural people in 6 California whom you represent have already gotten the 7 federal notices. 8 MR. VARANINI: Correct. 9 SPECIAL MASTER: They've already had an 10 opportunity up until December 7 to submit claims. 11 You're kind of saying they should -- because we have a 12 parens patriae claim on their behalf, they should get a 13 second whack at the Apple? 14 MR. VARANINI: Not exactly, Your Honor. We're 15 saying one of two things here. Okay? This shades into 16 the other issues. So we believe that for allocation 17 purposes, for allocation purposes from what we can see 18 from the face of what was done, because that's all we 19 have -- we don't have access to the notice and claims 20 data -- so what we can see from the face of things is we 21 believe there are deficiencies where natural people 22 didn't get their fair shot. 23 In the context of allocation there is notice. 24 Notice as you've heard these gentlemen and lady talking 25 about have to do with reach, right? How many eyeballs</p>	<p style="text-align: right;">Page 104</p> <p>1 the court? 2 It puts us in a really sticky situation. So 3 one of -- we proposed one of two paths. Either -- you 4 know, either reform the claims process as part of the 5 allocation plan, which Mr. Alioto has referred to he may 6 be open to, or extend the claims deadline so that we can 7 tell California natural persons they have an opportunity 8 to claim. 9 Now one final point. We have said that Your 10 Honor, even on that point, extending the claims 11 deadline, that Your Honor has a choice. You can do that 12 as to California natural people only because we and we 13 alone of all the groups of claimants have this parens 14 claim that's out there for them. And that is unique, 15 and that is something that the court can use to make a 16 difference. And we've given Your Honor cases and 17 argument on that. Or Your Honor can extend it as to 18 everybody. 19 And on that point, Mr. Alioto has expressed his 20 fears about corporations being unfairly advantaged as 21 part of that. We responded to that. We believe there's 22 no evidence to back that up. But more importantly, we 23 believe there's a couple of constructive solutions that 24 Your Honor can recommend to deal with that if Your Honor 25 feels it's more appropriate to extend the claims</p>
<p style="text-align: right;">Page 103</p> <p>1 literally saw the advertisement. That's important for 2 opt-out purposes. It's important for due process 3 purposes. But that's different than generating claims 4 to make sure that, for example, natural people had their 5 fair shot. Based on the face of what we're seeing, we 6 don't believe for reasons that we've already said in our 7 brief that natural people had their fair shot. 8 Now we asked for notice and claims data to give 9 a more refined -- more refined analysis for the benefit 10 of Your Honor. And that was ultimately denied, as Your 11 Honor is well aware. And it's now pending in front of 12 Your Honor. So absent that, all we have to go on is 13 what's on the face of it, and we believe that's 14 insufficient. 15 So how this plays in the state court because 16 Your Honor asked. This is in the papers, so I apologize 17 for repeating it. But how it plays in state court is we 18 can't put in a notice that we think California natural 19 people already had their opportunity to claim and that's 20 it because we don't believe it. So -- but on the other 21 hand, the claim's deadline has closed, so do we tell 22 people: Well, go ahead and file a claim and maybe it 23 will be honored and maybe it won't? Do I tell people 24 well, the special master has recommended against it, so 25 you could file it, but we plan to make an objection to</p>	<p style="text-align: right;">Page 105</p> <p>1 deadline as to everyone. 2 SPECIAL MASTER: So Mr. Alioto, why isn't an 3 easy solution to do what Mr. Varanini says? California 4 natural persons are special because they're the only 5 ones for whom a parens claim was brought. They need to 6 be given a fair opportunity to file claims under the 7 parens lawsuit, extend the deadline for California 8 natural people. And if anybody -- if anybody objects to 9 it as being improper disparate treatment, we say sorry, 10 they're the only ones who have a parens claim. Done, 11 easy, fix. Right? Wrong? 12 MR. ALIOTO: Mr. Paul Novak has been working 13 with the AG. He'll respond. 14 MR. NOVAK: Over here. Paul Novak of the 15 Milberg firm. 16 Let me first identify a couple of points in Mr. 17 Varanini's presentation and his papers that I think we 18 agree with. The first is I think he is accurate in 19 distinguishing the posture of California natural 20 claimants vis-à-vis other class claimants in that they 21 are the only ones with the companion parens patriae suit 22 that has also been pending and litigated, albeit in the 23 separate form at the same time. We recognize that 24 distinction. 25 He also is accurate that the district court</p>

<p style="text-align: right;">Page 106</p> <p>1 possesses equitable discretion to extend claim deadlines  2 generally. We don't contest that. We don't believe it  3 is necessary given the adequacy in our view of the  4 notice that has been implemented to California claimants  5 that a -- that a deadline extension is necessary, or  6 that an extension of that deadline would be necessary  7 for purposes of issuing final approval of our  8 settlement. But we recognize the sensitivities that are  9 associated with the parens case pending at the same  10 time. And if that's the solution that the court  11 imposes, so be it based upon that distinguished posture.  12 SPECIAL MASTER: But what's the downside?  13 MR. NOVAK: Our primary concern is the exposure  14 to the types of objections that might come from other --  15 from other corners or other angles. But aside from --  16 that's our primary concern, and -- and if the court  17 doesn't find that concern to be one that's particularly  18 persuasive, I don't -- I don't think we otherwise have  19 an issue with it.  20 SPECIAL MASTER: Well, I mean, I was contacted  21 by an enterprising aggregator directly on the afternoon  22 of December 6th asking me to do something to facilitate  23 his ability to file claims. And -- you know, so I'm  24 aware that there is that -- you know, there is that  25 industry out there which -- but...</p>	<p style="text-align: right;">Page 108</p> <p>1 with the projection, which in other cases that's been  2 provided.  3 But let's assume for the sake of argument,  4 because I'm not trying to evade the question, that  5 that's what is going to happen; that at the end of the  6 day, leaving aside this issue of giving people treble  7 payment, let's say based on single damages just for the  8 sake of the argument for a moment. So that's the idea  9 that people at the maximum, if they filed the claim,  10 they're only going to get back their single damages.  11 And let's assume that exhausts the fund  12 entirely. Well, if it's single damages, that's okay  13 because there is a preference for direct distribution.  14 So if you have a fund, and assuming Your Honor is  15 otherwise okay with the allocation plan, and, you know,  16 the money that was set aside for people to file claims,  17 both people and corporations, you give them single  18 damages, the money is completely run out, there isn't a  19 cent left -- and this includes issues with people having  20 moved; you can't give them checks. This includes trying  21 to track people down and you don't succeed. Let's just  22 assume for the sake of argument there isn't even that  23 ghost of a residue left.  24 Agreed -- I would agree based on federal law  25 without respect to California law, I would agree cy pres</p>
<p style="text-align: right;">Page 107</p> <p>1 I don't know. I'm feeling as if I'm not  2 hearing any serious downside to extending the deadline  3 -- recommending to Judge Tigar that he extend the  4 deadline for California natural persons except that you  5 might get a lot of objections from people that, you  6 know, I think we could deal with. I don't want to do  7 anything that has unfortunate consequences, you know,  8 unforeseen consequences, so -- but I'm not hearing any  9 except the objections that might come in.  10 MR. NOVAK: I -- I think that's probably an  11 accurate characterization.  12 SPECIAL MASTER: Okay. Mr. Varanini, as long  13 as you're on a roll here, what -- you had some other  14 issues. You raised the issue of cy pres. You said  15 there's no cy pres provision in the -- in this  16 settlement.  17 MR. VARANINI: Correct.  18 SPECIAL MASTER: The contemplation is  19 everything would be distributed pro rata, but how does  20 that disadvantage your California natural people?  21 MR. VARANINI: Well, there are two parts to  22 that. One is we don't know if it's -- we don't have  23 anything in the record that says that it's all going to  24 be distributed. We have statements being made in  25 briefing, but we don't actually have the claims data</p>	<p style="text-align: right;">Page 109</p> <p>1 is not an issue. Okay? But then -- and again, we're  2 only looking at the face of the notice plan and the  3 allocation plan because we don't have the data. Data  4 would allow us to give a more refined perspective than  5 we can give. Here we're talking treble damages. Okay?  6 So this is the idea that corporations and individuals  7 not only should get the full value of their claims, but  8 that that should be trebled.  9 And so the question that's in front of Your  10 Honor, again in the absence of additional data, is is it  11 appropriate for those folks to get three times the value  12 of their claim or is that a windfall. And if it's a  13 windfall, should that extra money go cy pres or should  14 there be at least notice to try to find additional  15 claimants first.  16 We've proposed both as potential alternatives  17 for the court. So we said well, we think based on other  18 cases there's sort of obvious additional notice that  19 could be done to gin up claims. And because we don't  20 have the data, we don't know whether those obvious  21 additional notice that was done in other cases could be  22 done here or not.  23 All we can do is point to the other cases, and  24 then Your Honor has to make whatever decision Your Honor  25 feels is appropriate. Or we said -- let's say it did</p>



<p style="text-align: right;">Page 110</p> <p>1 not turn out to be the case, that the indirect purchaser  2 plaintiffs come back and say look, this really would  3 cost us way too much money, and it's just not going to  4 gin up claims, okay? Well, then we said well, wait a  5 minute, then if there is this windfall, why not leave  6 some money left over for cy pres after everybody gets  7 the value of their claims in full. Then that way we  8 know everyone in the classes of the different state  9 specific damage classes gets some sort of benefit. It  10 may be indirect, but they're going to get a benefit.  11 And as long as everyone follows the proper  12 protocol that's been set out in Ninth Circuit cases, a  13 protocol we're very experienced with, there shouldn't be  14 the kinds of issues that have arisen in other cases such  15 as Kellogg, the Ninth Circuit case. So that's why we  16 thought there's this sort of interplay between claims  17 and cy pres.  18 SPECIAL MASTER: Okay.  19 MR. NOVAK: May I respond to that? Again, Mr.  20 Novak on behalf of the IPPs.  21 Let me make a couple observations with respect  22 to the plan of allocation, its relationship to notice,  23 and the issue of single versus treble damages.  24 First, as has already been discussed, the  25 adequacy of the notice plan has already been touched</p>	<p style="text-align: right;">Page 112</p> <p>1 cases where treble damages as the cap was acceptable to  2 the court for purposes of issuing final approval, but  3 also even to the California attorney general for  4 purposes of obtaining final approval on some of those  5 settlements.  6 SPECIAL MASTER: In LCD there was a treble  7 damage cap.  8 MR. NOVAK: LCD had a treble damage cap.  9 SPECIAL MASTER: Did the California attorney  10 general complain about that there?  11 MR. VARANINI: No, we did not.  12 SPECIAL MASTER: Of course, there was more  13 money.  14 MR. VARANINI: Well, if -- if I may, aside from  15 the issue of whether there was more money or not, and we  16 were working with other states and so had to compromise,  17 there were two key distinguishing factors about LCDs, at  18 least we thought. Now Your Honor may disagree with  19 that. One of those -- one of the distinguishing factors  20 was there was a more extensive notice campaign done for  21 purposes of ginning up claims than is being done here.  22 SPECIAL MASTER: Right.  23 MR. VARANINI: The second distinguishing  24 factors are the amount of the fees claims were lower, so  25 there was more money in the pot.</p>
<p style="text-align: right;">Page 111</p> <p>1 upon. I think even the California attorney general  2 recognizes that the notice plan as implemented meets the  3 due process requirements and Rule 23 requirements.  4 Exhibit C of his declaration, the claim stimulation  5 document that references the notice plan, states, quote:  6 "Due process notice programs must adhere  7 to the requirements of Rule 23 claim  8 stimulation programs. Unshackled from these  9 requirements allow us to think outside the  10 box."  11 So what Mr. Varanini is discussing is something  12 that exceeds the requirements that class counsel has for  13 purposes of creating and submitting and implementing the  14 notice plan that then informs the claims administration  15 process.  16 As it relates to claims administration,  17 although we don't have final data, and in the event that  18 the court extends the deadline for the submission of  19 claims, won't have the deadline -- won't have the data  20 for an even greater period of time, but what we think is  21 going to happen with -- based simply upon the claims  22 that have been submitted to date is that claimants are  23 going to receive much closer to single damages than they  24 will to treble damages.  25 And we note that there are a number of other</p>	<p style="text-align: right;">Page 113</p> <p>1 SPECIAL MASTER: Not a lot.  2 MR. VARANINI: Not a lot. And there was -- in  3 LCDs there was a reversionary -- there was -- sorry,  4 reversionary is the wrong term. There was a clause that  5 said if there was any money left over, it would go to  6 our cy pres. So there were distinguishing features of  7 LCDs that we could say well, maybe -- look, in a perfect  8 world -- you get the point.  9 SPECIAL MASTER: Fair enough. Go ahead.  10 (Electronic interruption.)  11 MR. NOVAK: The other point I wanted to make,  12 and this is with respect to at what point does a court  13 make a determination. We've given enough money to  14 claimants. Let's proceed to distribute the remaining  15 money on a cy pres basis.  16 I brought to Mr. Varanini's attention this  17 morning when we were discussing these issues that some  18 of the other circuits -- the Ninth Circuit hasn't spoken  19 on this issue or, for that matter, any court in the  20 Ninth Circuit that I'm aware of. Other circuits have  21 addressed the issue of at what point do you go to cy  22 pres.  23 And in the Second Circuit, specifically in the  24 Masters versus Wilhelmina modelling case, it's 473 F.3d  25 423. The second circuit actually found it to be an</p>

<p style="text-align: right;">Page 114</p> <p>1 abuse of discretion to consider cy pres distribution  2 before making a treble damage allocation to the  3 claimants.  4 And I think a couple of other courts have come  5 to a similar conclusion, although not probably as  6 clearly as the Masters decision. One is a Bank America  7 decision 775 F.3d 1060. I'm not going to suggest that  8 it went as far as Masters versus Wilhelmina, but it  9 cited language from that decision on the cy pres issue  10 and the treble damages issue approvingly. That's from  11 the Eighth Circuit. There's also an in re publication  12 paper --  13 SPECIAL MASTER: You know what, I'm going to  14 ask you to do the same.  15 MR. NOVAK: I'll submit --  16 SPECIAL MASTER: If you could just submit a  17 letter with any citations you wanted.  18 MR. NOVAK: Okay. Particularly that one  19 because I've only got a Lexis cite for it, and you'll  20 need it in Westlaw.  21 SPECIAL MASTER: All right.  22 MR. NOVAK: So other courts that have looked at  23 that issue have explicitly found that it's okay to go up  24 to a full treble damage, and in some instances have said  25 it was an abuse of discretion not to go first to treble</p>	<p style="text-align: right;">Page 116</p> <p>1 appropriate.  2 And let me make one final observation. And  3 that is that this whole idea that we need to go until  4 the very end of the claims distribution process when all  5 of this data has been submitted and make the  6 determination based on that, if we continue to extend  7 the claims deadline, it has the problem of continually  8 forestalling the distribution of money to claimants,  9 which given the amount of time between the beginning of  10 the class period -- oh, that actually reminds me of one  11 other thing.  12 And that is there -- if you had actually  13 obtained these damages back when these purchases were  14 initially made at the beginning of the damage period,  15 and didn't have the time value of that money for what's  16 near 20 years, that makes treble damages all the more  17 appropriate, even though I don't think any claimants are  18 going to be getting it based on the claims data that's  19 been submitted.  20 SPECIAL MASTER: You're worried that people may  21 have been eight years old when the claim period started,  22 but they may be 80 before they get any money.  23 Mr. Varanini, I'm worried about your practical  24 problem here. Let's say I recommend next week that the  25 claim deadline be extended. Nothing is going to happen</p>
<p style="text-align: right;">Page 115</p> <p>1 damages. The Lupron marketing decision that Mr.  2 Varanini pointed to actually had a 1.67 multiple of  3 damages for claimants as -- as the cut off in that  4 settlement, and it was a cut off that had been  5 negotiated.  6 What happened in that case is plaintiffs  7 originally had a 100 percent allocation plan. You had  8 some objectors come in and say hey, we should receive  9 more than 100 percent before cy pres distributions are  10 made. And so a negotiation to revise the settlement to  11 increase it to 1.67 times was made.  12 And then at that point, the court said because  13 the objectors settled with that revision to the  14 settlement and then came back later and argued about it,  15 and the court said you've -- you've waived your  16 arguments with respect to getting even more than 1.67  17 times your damages because you obtained consideration  18 for it when you revised the settlement agreement.  19 So basically I think the case law certainly  20 allows for distributions to go up to treble damages, if  21 not require it, particularly in an instance where as  22 here it's not contested that the notice plan meets due  23 process and Rule 23 requirements for being the best  24 practicable notice. And for those reasons we don't  25 think that the modifications to the allocation plan are</p>	<p style="text-align: right;">Page 117</p> <p>1 on that until March 15 unless I ask Judge Tigar to rule  2 separately on that issue quickly.  3 MR. VARANINI: Well, there are -- sorry.  4 SPECIAL MASTER: And you've got a January 27  5 hearing.  6 MR. VARANINI: Yes.  7 SPECIAL MASTER: And you've got to give notice.  8 MR. VARANINI: Yes. There are three responses  9 to that. First of all, if nothing else, we could at  10 least say that Your Honor has in your report and  11 recommendation recommended the extension of claims  12 deadline. That would be positive encouragement that we  13 could point out to people to submit claims, even if  14 ultimately the court retains the discretion to say no,  15 and we would have to say something about that to be  16 frank.  17 The second point is that as Your Honor  18 indicated, Your Honor could recommend to Judge Tigar to  19 rule quickly on this one issue so we would have an  20 answer before the hearing.  21 The third possibility is that we do have  22 pursuant to the proposal we had made to extend the  23 claims deadline, we've left some water in there. So if  24 something happened, we could -- we could, for example,  25 move the hearing back by a week or two and still have</p>

<p style="text-align: right;">Page 118</p> <p>1 more than enough time for people to get notice and still  2 not leave things out of sync with the final approval  3 hearing.  4 At some point we do recognize that if things  5 get pushed back far enough, that's on us. So we want to  6 have the preliminary approval hearing very soon, and we  7 prefer to have it on the date that we set, but we did  8 leave a little bit of water in our proposal to move it  9 forward to June 30th so that we would have the ability  10 to deal with these kinds of circumstances.  11 SPECIAL MASTER: Okay. So I've covered my  12 agenda. Is there anyone who has anything remaining that  13 they think should be brought to my attention?  14 Mr. Cooper.  15 MR. COOPER: This doesn't actually have to do  16 with any of the substance we've been talking about. One  17 of my questions relates to the protocols for getting  18 notices and distributions. You posted yesterday an  19 email exchange that apparently you had with Mr. Alioto,  20 and I'm not certain with Mr. Scarpulla or not, which set  21 out the issues you wanted to talk about today. The  22 original emails and your email responding were not sent  23 to all counsel, and so --  24 SPECIAL MASTER: My bad.  25 MR. COOPER: Well, apparently Mr. Alioto's --</p>	<p style="text-align: right;">Page 120</p> <p>1 that someone would just have to call me on the phone. I  2 would really like to avoid that, but, you know, if  3 circumstances demand it, my Order of Reference permits  4 it.  5 MR. COOPER: I was aware of what it says in the  6 Order of Reference about ex parte communications,  7 although I do believe the word was "scheduling" and not  8 "procedural" but I'm not quibbling -- I'm not quibbling  9 about that. But this particular email seemed not to be  10 in that category where you've talked substantively about  11 what's going to happen, and that's why I'm bringing it  12 up, so...  13 SPECIAL MASTER: I've already apologized. I  14 don't know what more I can do.  15 MR. COOPER: I'm not trying to beat it up  16 anymore.  17 My second question was during the discussion  18 you were having with regard to notice and claims in the  19 discussions, particularly about the claims rates and  20 what the experience has been, you made a statement, and  21 I wrote the words down, and I believe it's a question to  22 Mr. Alioto with regard to the information about the  23 claims experiences. And you said: Would that be the  24 end of the, quote, "final" -- or when, quote, "the final  25 papers are filed."</p>
<p style="text-align: right;">Page 119</p> <p>1 SPECIAL MASTER: I apologize.  2 MR. COOPER: -- directly going to you initially  3 was not sent over yesterday. So my question is what are  4 the protocols so we can all be getting timely notice of  5 what's going on?  6 SPECIAL MASTER: Okay. The Order of Reference  7 allows me to have ex parte conversations with counsel on  8 procedural issues. I keep it -- try to keep it to a  9 minimum. At the very beginning when we were getting  10 organized, Mr. Alioto and I talked quite a bit as we've  11 gotten into this. I've tried to keep it more formal and  12 more transparent.  13 So I think that from now on any email exchange  14 with me, either email or letter exchange with me should  15 be posted on Case Anywhere on the JAMS website, and I  16 failed to do that. I was actually on vacation, and  17 that's just my mistake.  18 And -- I mean I think I sent it to the people I  19 thought would have the most interest in it, Mr. Varanini  20 and Mr. Scarpulla and Mr. Alioto. So I apologize to  21 everyone else. But I think that's the way we should do  22 it. Any communications with me should be -- should be  23 posted on the Case Anywhere.  24 You know, I suppose something could come up  25 that would be incredibly urgent, a procedural matter</p>	<p style="text-align: right;">Page 121</p> <p>1 And that confused me because I thought that the  2 only papers that are yet to be filed is your report and  3 objections and responses to that, and I didn't know what  4 you were referring to by final papers.  5 SPECIAL MASTER: I don't either. But I take it  6 what would normally happen is that there'd be an ongoing  7 reporting to the court of the progress of the claim  8 process to allow the court to confirm that the claim  9 process was being carried out the way it was supposed to  10 be carried out. So...  11 MR. COOPER: Well, I just wasn't certain if  12 there was some briefing schedule that I wasn't aware of.  13 SPECIAL MASTER: No, no.  14 All right. Anything else? I have a couple of  15 things to say at the end, but --  16 MR. ALIOTO: Two points, Your Honor.  17 SPECIAL MASTER: Mr. St. John.  18 MR. ST. JOHN: Your Honor, do you want any  19 argument on the issues raised in IPP counsel's surreply?  20 SPECIAL MASTER: Well, what are you referring  21 to?  22 MR. ST. JOHN: The judicial estoppel vis-à-vis  23 Chunghwa and the Philips and Samsung settlements.  24 SPECIAL MASTER: The point on Philips and  25 Samsung I think that you made was they're so big there</p>

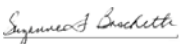


<p style="text-align: right;">Page 122</p> <p>1 must be something out of whack.</p> <p>2 MR. ST. JOHN: Correct, Your Honor.</p> <p>3 SPECIAL MASTER: The others must be too small.</p> <p>4 Words to that effect.</p> <p>5 MR. ST. JOHN: More that the size is</p> <p>6 attributable to factors other than class counsel's</p> <p>7 efforts such that they're not properly -- that the</p> <p>8 entirety of those settlements are not properly</p> <p>9 includable in the fee base.</p> <p>10 SPECIAL MASTER: I think I have your arguments</p> <p>11 on that. I mean -- I mean I may not totally remember</p> <p>12 them now, but I remember reading them and understanding</p> <p>13 them when I read them.</p> <p>14 MR. ST. JOHN: Fair enough, Your Honor.</p> <p>15 SPECIAL MASTER: Did I see other hands? Mr. --</p> <p>16 MR. SCARPULLA: I just have a quick question,</p> <p>17 Your Honor. To the extent that Your Honor is going to</p> <p>18 have a hearing on fees, will you let us know that or if</p> <p>19 you're not --</p> <p>20 SPECIAL MASTER: No, it will be held secretly.</p> <p>21 No.</p> <p>22 You mean a hearing on the allocation of fees,</p> <p>23 or the hearing on the total amount of fees?</p> <p>24 MR. SCARPULLA: Well --</p> <p>25 SPECIAL MASTER: Oh, I see what you're</p>	<p style="text-align: right;">Page 124</p> <p>1 want to briefly address, if now is the time, arguments</p> <p>2 made in surreply about Chunghwa and judicial estoppel.</p> <p>3 SPECIAL MASTER: Sure.</p> <p>4 MR. ST. JOHN: Class counsel is playing fast</p> <p>5 and loose with the idea that small -- small settlement,</p> <p>6 their words, was invaluable and an icebreaker. And</p> <p>7 there's no dispute that those words were represented to</p> <p>8 the court, and there's still no dispute that Chunghwa's</p> <p>9 assistance was invaluable. That's at page 13 of the</p> <p>10 surreply.</p> <p>11 What they try to do is limit that value in the</p> <p>12 early stage of litigation. But class counsel disposed</p> <p>13 of the class claims for again a small settlement and</p> <p>14 made those representations, and the fact that it causes</p> <p>15 litigation regrets, that's precisely what judicial</p> <p>16 estoppel targets.</p> <p>17 Class counsel argues or they try to minimize</p> <p>18 the value of the Chunghwa settlement by emphasizing that</p> <p>19 DOJ only prosecuted one corporate defendant. I don't</p> <p>20 think that's particularly uncommon. The DOJ has limited</p> <p>21 resources. They prosecute a small number of defendants</p> <p>22 to bust the settlement -- or bust the conspiracy and</p> <p>23 then leave the rest to private litigants. That's</p> <p>24 precisely what DOJ did here.</p> <p>25 SPECIAL MASTER: What is -- your point about</p>
<p style="text-align: right;">Page 123</p> <p>1 saying -- no. What I said in that email was that I</p> <p>2 wanted to focus this hearing on the issues that we've</p> <p>3 already talked about.</p> <p>4 MR. SCARPULLA: Correct.</p> <p>5 SPECIAL MASTER: I am not excluding -- you may</p> <p>6 say anything you want to about fees now. I mean I think</p> <p>7 I understand all the arguments you've made. I have them</p> <p>8 in mind, and we'll consider them. If there's anything</p> <p>9 more anybody wants to say about the fee request or the</p> <p>10 expense request, you may do so. If you were sandbagged</p> <p>11 and thought that wasn't going to come up today, you</p> <p>12 know, I'm -- I'm -- I don't know what to say. I don't</p> <p>13 have time to set another oral argument. But you're free</p> <p>14 to say anything you want now.</p> <p>15 MR. SCARPULLA: Well, I think it's all in the</p> <p>16 briefs, and I wasn't -- but I wasn't sure whether Your</p> <p>17 Honor was going to have that as a separate hearing from</p> <p>18 this one.</p> <p>19 SPECIAL MASTER: No. I think what I said was I</p> <p>20 think I have enough in the briefing and in the</p> <p>21 declarations from the various attorneys and so on and so</p> <p>22 on to make hopefully an intelligent ruling on that.</p> <p>23 MR. SCARPULLA: Right.</p> <p>24 SPECIAL MASTER: Sir.</p> <p>25 MR. ST. JOHN: Your Honor, I apologize. I do</p>	<p style="text-align: right;">Page 125</p> <p>1 the Chunghwa settlement is what?</p> <p>2 MR. ST. JOHN: The Chunghwa settlement created</p> <p>3 a lot of value beyond its \$10 million.</p> <p>4 SPECIAL MASTER: Okay.</p> <p>5 MR. ST. JOHN: And that value is not really</p> <p>6 attributable to class counsel.</p> <p>7 SPECIAL MASTER: So we should reduce the fee</p> <p>8 request to reflect that?</p> <p>9 MR. ST. JOHN: Correct, Your Honor.</p> <p>10 SPECIAL MASTER: Okay.</p> <p>11 MR. ST. JOHN: It's the first stage of the</p> <p>12 rocket.</p> <p>13 SPECIAL MASTER: Okay.</p> <p>14 MR. ALIOTO: Two final points, Your Honor, and</p> <p>15 I'll be very brief.</p> <p>16 One, there was a statement earlier about</p> <p>17 further notice to an additional group. There's nothing</p> <p>18 in the papers about this. I want to just make sure this</p> <p>19 is focused up.</p> <p>20 After the formal notice program, our claim</p> <p>21 administrator was able to get an email list of claimants</p> <p>22 in the DRAM case, people who had actually made claims in</p> <p>23 the DRAM case. And our claims administrator arranged</p> <p>24 for direct email notice to be sent to those claimants.</p> <p>25 It was a supplement to the notice. It wasn't something</p>

<p style="text-align: right;">Page 126</p> <p>1 we did because we were having a problem or having 2 trouble. We did it as a supplement to the notice to 3 spur claims. And you can imagine that was effective 4 because these are people who had claimed before, and 5 they were -- they would be motivated to claim again. 6 The other argument I want to make and just a 7 sentence or two is we have made in our papers a standing 8 argument with respect to Mr. Scarpulla and Cooper. 9 There's nothing been said about that in these 10 proceedings. We have no intention of waiving that. We 11 think it's a very important issue that counsel should 12 not be able to come in and make all kinds of claims in 13 settlement approval hearings. 14 They certainly have the right to do that under 15 Rule 23, but the crucial point is you have to have a 16 client. You can't just come in off the street or on a 17 volunteer basis or on an intermeddler basis and make 18 these arguments because these have consequences for us. 19 We're going to be briefing these questions. We 20 may have appeals. It's a very time-consuming, expensive 21 process, and you have to meet that threshold requirement 22 of representing a client. The cases are clear on that. 23 And the cases cited by the objectors do not provide any 24 support for these objections on behalf of indirect 25 purchasers. There's absolutely no basis for doing so.</p>	<p style="text-align: right;">Page 128</p> <p>1 MR. SCARPULLA: That is correct. 2 SPECIAL MASTER: Okay. But in bringing these 3 objections that you both have made, you are not bringing 4 them on behalf of your clients, you are bringing them in 5 your capacity as class counsel in furtherance of your 6 fiduciary duties, correct? 7 MR. SCARPULLA: I think Mr. Cooper is bringing 8 it on behalf of his clients. 9 MR. COOPER: No, I think that's a fair 10 statement from me. 11 MS. CAPURRO: That's not what their papers said 12 when they filed their objection. 13 SPECIAL MASTER: Well, their papers -- 14 MS. CAPURRO: None of their papers have said 15 that today. 16 SPECIAL MASTER: No, none of their papers name 17 a client on whose behalf they're bringing the objection. 18 As I understand it, they are bringing it in their 19 capacity as class counsel, not on behalf of a client. 20 And that is your standing. 21 MR. ALIOTO: We would just ask you to look at 22 the authorities on that, Your Honor. We think it's an 23 important point -- 24 SPECIAL MASTER: Okay. 25 MR. ALIOTO: -- and that we'd like you to</p>
<p style="text-align: right;">Page 127</p> <p>1 SPECIAL MASTER: Okay. 2 MR. ALIOTO: Thank you. 3 SPECIAL MASTER: Glad you brought that up. Mr. 4 -- just start with Mr. Cooper because you're closest. 5 As I understand the papers, you and your firm 6 currently represent a named or formerly named class 7 representative, correct? 8 MR. COOPER: That is correct, Your Honor, but I 9 believe in addition we are counsel of record for the 10 entire class. 11 SPECIAL MASTER: I know. One question at a 12 time. Okay? So you actually may represent a named 13 member of the class? 14 MR. COOPER: We do. 15 SPECIAL MASTER: Okay. Mr. Scarpulla, you did 16 represent a named class representative when you were 17 with the Zelle firm. What is your status now? 18 MR. SCARPULLA: As part of my agreement leaving 19 Zelle, I was made a -- another lawyer of record for 20 those -- for that client. However, I was told by Zelle 21 that the client does not -- does not approve of my 22 objections. 23 SPECIAL MASTER: Okay. So -- but officially 24 you are still counsel of record for a client in this 25 case?</p>	<p style="text-align: right;">Page 129</p> <p>1 consider. 2 SPECIAL MASTER: Ms. Capurro. 3 MS. CAPURRO: If I may just briefly, I have 4 look extensively at the law on this, and I can find 5 absolutely no case that permits counsel in a case who 6 are not court appointed class counsel. The cases that 7 they cite in their brief -- and they're not court 8 appointed class counsel to bring an objection to a class 9 action settlement and oppose the position of the court 10 appointed class counsel. 11 SPECIAL MASTER: Why are they not court 12 appointed class counsel the same as all the other 13 lawyers in the -- 14 MS. CAPURRO: Mr. Alioto was the only court 15 appointed class counsel. All of the case law that they 16 cite in their brief, those cases when they refer to 17 class counsel, they refer to the court appointed class 18 counsel. If you have a situation where every -- every 19 lawyer in an MDL case, which is potentially hundreds of 20 lawyers, is able to speak on behalf of the entire class, 21 I mean if you take that to its logical conclusion, how 22 do you run the case? 23 I mean Mr. Alioto would be saying one thing, 24 and they can pipe up and say something else. How do the 25 defendants know who to deal with? How does the court</p>

<p style="text-align: right;">Page 130</p> <p>1 know who to deal with? What's the point of even having 2 an order appointing lead counsel if they're able to do 3 that? 4 SPECIAL MASTER: Well -- 5 MS. CAPURRO: And this is not a procedural 6 issue, Your Honor, this is jurisdictional. And the fact 7 that they have filed this motion to be appointed as 8 co-lead counsel actually shows that they recognize they 9 have a standing problem. That's -- they're trying to 10 bootstrap themselves in here to get the court's nod to 11 give them the voice, you know, to be able to speak on 12 behalf of these objecting plaintiffs who they've never 13 identified. 14 SPECIAL MASTER: Well, you know, I'm -- I'm 15 cognizant also the court has an independent fiduciary 16 duty to protect the interest of the class. And if 17 information is brought to the court from any source, I 18 sort of think the court has an obligation to consider 19 it. But I -- I need to look at the authorities you've 20 cited with care. 21 MS. CAPURRO: I submit there is no law, and 22 they have cited to none, and it is their burden to show 23 standing. They have not cited to one case -- 24 SPECIAL MASTER: Okay. 25 MS. CAPURRO: -- that gives them standing.</p>	<p style="text-align: right;">Page 132</p> <p>1 is before it regardless of standing. 2 MS. CAPURRO: We're not disputing that. That's 3 not the argument. 4 SPECIAL MASTER: I think I understand the 5 argument. 6 MR. COOPER: You have briefing on all of this, 7 Your Honor. 8 SPECIAL MASTER: I do. I do. 9 MR. SCARBOROUGH: Your Honor, if we're down to 10 sort of parting remarks here, I just want to say from 11 the defendants' perspective, you know, we have put a 12 tremendous pot of money into escrow. As I think lead 13 counsel pointed out may be the second largest indirect 14 purchaser settlement ever. So a tremendous amount of 15 money that they have already paid, it's already sitting 16 in escrow and has been for some time. 17 That money was put there to buy global peace 18 for this litigation for IPP claims with the same factual 19 predicate. So that's what we want. That's what LG 20 already got. They already paid a considerably smaller 21 amount of money for the exact same release that we are 22 asking for here. So what we would like to see is at 23 least to get past that first threshold, that the money 24 that was paid, this extraordinarily large amount of 25 money that was paid is sufficient for the global</p>
<p style="text-align: right;">Page 131</p> <p>1 SPECIAL MASTER: I get it. 2 Is there -- Ms. Kirkham. You have your hand 3 up. Ms. Kirkham. 4 MS. KIRKHAM: Okay. I know I'm pointing out 5 the obvious, but if there was one lead counsel and all 6 other counsel are silenced by that appointment, and that 7 lead counsel recommends a settlement -- 8 SPECIAL MASTER: Who is going to object. 9 MS. KIRKHAM: -- you have an issue there. 10 SPECIAL MASTER: Okay. Mr. Bonsignore, I saw 11 some activity down there. 12 MR. BONSIGNORE: Yes, Your Honor, very briefly 13 I represent six plaintiffs, two of which were named 14 plaintiffs in the settlement class, and we joined and 15 adopted their arguments in my paper. I do agree that 16 they do have separate standing, but in the event -- 17 thank you. 18 SPECIAL MASTER: Good. 19 Mr. St. John. 20 MR. ST. JOHN: Your Honor, the argument you 21 just made is precisely the holding of Zucker v 22 Occidental Petroleum Corporation. I don't have the 23 cite, but it was Case No. 9756270 decided by the Ninth 24 Circuit on October 19th, 1999. The court has an 25 independent obligation to consider whatever information</p>	<p style="text-align: right;">Page 133</p> <p>1 release. 2 Just in the same way that the issues with the 3 LG settlement, none of these objections were raised 4 during the final approval of that settlement, the final 5 judgment entered there. It's understandable that there 6 could be some quibbles with allocation. What's going to 7 happen with that LG money? And that's fine, and that 8 can apply more broadly to the settlements that are now 9 before Your Honor for final approval. 10 As a general principle, I don't think 11 defendants have a problem if we tweak the allocation 12 plan. If notice is perhaps sent out again, as long as 13 it's done in a responsible, comprehensive fashion that's 14 really going to lead to final approval, I don't think we 15 have a problem with some of that being done. But we 16 want our deal, which we think is fundamentally sound, 17 approved now. And it's time to do that. 18 SPECIAL MASTER: Okay. I would like to just 19 take a minute and talk to Ms. Cohen. Give us two 20 minutes and we'll be right back. 21 (Recess 1:03 p.m. to 1:07 p.m.) 22 SPECIAL MASTER: Okay. Let me ask -- I'm not 23 sure whom -- a question. Mr. Alioto, I guess, you 24 talked about dealing with the Illinois and Washington 25 issues by sort of carving out of your pro rata scheme a</p>

<p style="text-align: right;">Page 134</p> <p>1 separate allocation scheme for them.</p> <p>2 THE WITNESS: Yes.</p> <p>3 SPECIAL MASTER: Correct?</p> <p>4 MR. ALIOTO: Yes.</p> <p>5 SPECIAL MASTER: Could the same kind of</p> <p>6 arrangement be made to accommodate the -- the Chunghwa</p> <p>7 settlement if -- if there are disparities between the</p> <p>8 distribution scheme that was approved by the court in</p> <p>9 Chunghwa and your distribution scheme? I mean it sort</p> <p>10 of as a practical matter, you only have \$10 million.</p> <p>11 What's the practical usefulness of giving notice to all</p> <p>12 the resellers saying oh, you can now submit claims?</p> <p>13 I mean I'm trying to find a solution to this</p> <p>14 Chunghwa problem if it turns out there is one.</p> <p>15 MR. ALIOTO: Well, certainly to -- to the</p> <p>16 extent that they were given notice that they weren't</p> <p>17 going to get anything, and if it turns out that in fact</p> <p>18 they're not going to be getting anything, that's</p> <p>19 consistent. And -- and do you have to send another</p> <p>20 notice to them? I don't think so.</p> <p>21 But the big question is is there some</p> <p>22 unfairness there, and is there some inconsistencies, the</p> <p>23 objector says. I would like to address that first and</p> <p>24 be absolutely certain. You know, that settlement was</p> <p>25 many, many years ago, and I don't have the judgment</p>	<p style="text-align: right;">Page 136</p> <p>1 But when I hear discussions of future rounds of</p> <p>2 briefings, I mean that's why I asked the question</p> <p>3 before. I thought it was confusing.</p> <p>4 SPECIAL MASTER: Well, I mean, I guess if</p> <p>5 this -- if I'm going to hew to the court's schedule,</p> <p>6 then I'm going to need by Thursday some material, and</p> <p>7 I'll finish with Chunghwa -- just some other material.</p> <p>8 I'm going to need -- somebody mentioned cases regarding</p> <p>9 treble -- I'm going to need any cases that you want us</p> <p>10 to look at that you -- I didn't give you a chance to</p> <p>11 give me the citations of today -- the docket numbers for</p> <p>12 the four complaints in this case so we can easily find</p> <p>13 them and look at what was alleged or not alleged.</p> <p>14 We're having a handwriting problem.</p> <p>15 Oh, Ms. Kirkham was going to give me an</p> <p>16 additional cite to the -- a reference that she made to</p> <p>17 the Renfrew's report and recommendation.</p> <p>18 And then information about -- I'd like -- I'd</p> <p>19 like Mr. Fisher to provide an additional declaration</p> <p>20 with the updated status of the claim process in as much</p> <p>21 specificity as he, you know, reasonably and</p> <p>22 professionally can.</p> <p>23 And finally we get to Chunghwa, and I -- we</p> <p>24 definitely need copies of all the relevant documents</p> <p>25 that allow us to see what was settled and what was</p>
<p style="text-align: right;">Page 135</p> <p>1 memorized, but I'm going to certainly be looking at it.</p> <p>2 I think maybe the better course there, Your</p> <p>3 Honor, would be to let us review some of these points</p> <p>4 that they made and try and identify the problem and then</p> <p>5 respond to you with this next round of briefing.</p> <p>6 SPECIAL MASTER: We're not -- we're not talking</p> <p>7 rounds of briefing here. I mean --</p> <p>8 MR. COOPER: What next round of briefing?</p> <p>9 MR. ALIOTO: Well, with this next submission, I</p> <p>10 suspect, is probably a better choice of words.</p> <p>11 MR. COOPER: What next submission? I thought</p> <p>12 we went through this. There are no next submissions.</p> <p>13 SPECIAL MASTER: Well, I'm concerned that I do</p> <p>14 not have the full picture on Chunghwa, and I'm not about</p> <p>15 to issue a report and recommendation on something I</p> <p>16 don't feel comfortable that I have the full picture</p> <p>17 about.</p> <p>18 MR. COOPER: Well, I did offer, Your Honor, to</p> <p>19 send you the documents in consultation with Mr. Alioto</p> <p>20 what documents you should see.</p> <p>21 SPECIAL MASTER: Yes.</p> <p>22 MR. COOPER: I'm not certain if that helps you</p> <p>23 or solves the issues, or if you want them to go together</p> <p>24 with some five-page letter or something not to exceed</p> <p>25 five pages. I'm sure we can do that relatively quickly.</p>	<p style="text-align: right;">Page 137</p> <p>1 ordered there. The question is whether we also need</p> <p>2 briefing, and I'd like to say no, but I think -- I think</p> <p>3 -- I think I do. I mean, I think I need something like</p> <p>4 a three to five pages from the Cooper group explaining</p> <p>5 why this is a problem and hopefully maybe suggesting</p> <p>6 what to do about it, and a brief from Mr. Alioto. Now,</p> <p>7 I think what we should do is maybe have those</p> <p>8 simultaneous briefs.</p> <p>9 Can we get those in by Friday?</p> <p>10 MR. COOPER: That's fine, Your Honor. We will</p> <p>11 send to Mr. Alioto today the list of documents that we</p> <p>12 think we need to send you copies of starting with the</p> <p>13 settlement agreement. Whatever is relevant regarding</p> <p>14 preliminary approval, final approval and judgments, and</p> <p>15 we can agree on what documents you should be looking at.</p> <p>16 And a brief not to exceed five pages -- simultaneous</p> <p>17 briefs not to exceed five pages by Friday?</p> <p>18 SPECIAL MASTER: Yes. Can we -- Ms. Cohen is</p> <p>19 asking for noon on Friday.</p> <p>20 MR. COOPER: Sure. How about Thursday?</p> <p>21 MS. COHEN: I would love it.</p> <p>22 SPECIAL MASTER: Thursday would be great.</p> <p>23 You've got a lot -- I mean, particularly Mr. Alioto has</p> <p>24 more on his plate than you do. We're really under the</p> <p>25 gun here, so Thursday would be very helpful.</p>

<p style="text-align: right;">Page 138</p> <p>1 MR. COOPER: I'm sure we can do it. That's</p> <p>2 three days.</p> <p>3 SPECIAL MASTER: But Friday at noon for sure.</p> <p>4 MR. ALIOTO: Friday at noon.</p> <p>5 SPECIAL MASTER: Mr. Bonsignore.</p> <p>6 MR. BONSIGNORE: Yes, I mentioned that I have</p> <p>7 objective evidence that some of the critical and</p> <p>8 decisive points that Mr. Alioto raised were not true.</p> <p>9 SPECIAL MASTER: You wanted to augment the</p> <p>10 record, as I recall.</p> <p>11 MR. BONSIGNORE: Yes, I have emails to him</p> <p>12 providing information regarding the Massachusetts and</p> <p>13 the testimony.</p> <p>14 SPECIAL MASTER: You're going to have to file a</p> <p>15 motion to augment the record.</p> <p>16 MR. BONSIGNORE: Okay. I'm just wondering</p> <p>17 why --</p> <p>18 SPECIAL MASTER: I'm not going to give you</p> <p>19 leave to do that here.</p> <p>20 MR. BONSIGNORE: Okay. I'm just wondering why</p> <p>21 that's treated differently than the other evidence that</p> <p>22 you said would complete your picture? What we have is</p> <p>23 a --</p> <p>24 SPECIAL MASTER: Because I think that's fair</p> <p>25 and just, and I have constraints, the date on which I</p>	<p style="text-align: right;">Page 140</p> <p>1 the record is clear as to what the answer is. Thank</p> <p>2 you.</p> <p>3 SPECIAL MASTER: All right. Thank you,</p> <p>4 everybody. This was not the two hours I hoped for, but</p> <p>5 it was three hours and 15 minutes, and you're to be</p> <p>6 congratulated for that.</p> <p>7 Mr. Cooper.</p> <p>8 MR. COOPER: I'm confused about whether the</p> <p>9 simultaneous admissions about Chunghwa is to be Thursday</p> <p>10 at 5 o'clock or Friday at noon.</p> <p>11 MR. GOLDBERG: Yours is Thursday and his is</p> <p>12 Friday.</p> <p>13 MR. ALIOTO: I need time. I need a little</p> <p>14 time.</p> <p>15 SPECIAL MASTER: Friday -- Friday noon.</p> <p>16 MR. COOPER: Okay.</p> <p>17 SPECIAL MASTER: Friday noon. If you get it by</p> <p>18 Thursday, you get a gold star.</p> <p>19 MR. COOPER: But they can't be simultaneous.</p> <p>20 SPECIAL MASTER: All right. We're off the</p> <p>21 record. Thank you very much.</p> <p>22 (TIME NOTED: 1:17 p.m.)</p> <p>23</p> <p>24</p> <p>25</p>
<p style="text-align: right;">Page 139</p> <p>1 have to get my report and recommendation in.</p> <p>2 MR. BONSIGNORE: I can provide the emails</p> <p>3 today.</p> <p>4 SPECIAL MASTER: You may do so. You may file</p> <p>5 the motion today and I'll consider it.</p> <p>6 Mr. Goldberg.</p> <p>7 MR. GOLDBERG: Joseph Goldberg for the IPP. I</p> <p>8 don't want to file anything.</p> <p>9 Before the very first break when you asked a</p> <p>10 question, and I just want to make sure that the record</p> <p>11 is clear as to the answer. You asked about what were</p> <p>12 the pending claims in the operative, which I believe is</p> <p>13 the fourth amended complaint. And I just want to make</p> <p>14 sure that as I understand it, the record is clear, and</p> <p>15 you're going to get the docket cites for all of these</p> <p>16 and you're going to look at it, and I think I'm</p> <p>17 accurately reporting.</p> <p>18 In the operative complaint, the fourth amended</p> <p>19 complaint, any pending -- any pending damages claimed is</p> <p>20 limited to the 22 class jurisdictions. That is the 21</p> <p>21 states and the District of Columbia. There is no</p> <p>22 pending damages claim in the operative complaint beyond</p> <p>23 those 22 jurisdictions. I believe when you review the</p> <p>24 complaint, you'll see that's correct. I think that's</p> <p>25 what you were asking, and I just want to make sure that</p>	<p style="text-align: right;">Page 141</p> <p>1 I, the undersigned, a Certified Shorthand</p> <p>2 Reporter of the State of California, do hereby certify:</p> <p>3 That the foregoing proceedings were taken</p> <p>4 before me at the time and place herein set forth; that</p> <p>5 any witnesses in the foregoing proceedings, prior to</p> <p>6 testifying, were duly sworn; that a record of the</p> <p>7 proceedings was made by me using machine shorthand which</p> <p>8 was thereafter transcribed under my direction; that the</p> <p>9 foregoing transcript is a true record of the testimony</p> <p>10 given.</p> <p>11 Further, that if the foregoing pertains to the</p> <p>12 original transcript of a deposition in a Federal Case,</p> <p>13 before completion of the proceedings, review of the</p> <p>14 transcript [ ] was [ ] was not requested.</p> <p>15 I further, certify I am neither financially</p> <p>16 interested in the action nor a relative or employee of</p> <p>17 any attorney or party to this action.</p> <p>18 IN WITNESS WHEREOF, I have this date subscribed</p> <p>19 my name.</p> <p>20 Dated: 1/10/16.</p> <p>21</p> <p>22 </p> <p>23 SUZANNE F. BOSCHETTI</p> <p>24 CSR No. 5111</p> <p>25</p>



[&amp; - 764-8700]

Page 1

<b>&amp;</b>	<b>1900</b> 4:21	<b>294-4615</b> 11:7	<b>5</b>
<b>&amp;</b> 3:11 4:12 5:3,12 6:17 7:4 10:3,11 11:3,19 12:4 13:4 14:22 15:2,11,17,21 16:25 17:14,25	<b>19107</b> 4:7 <b>1917</b> 1:6 2:6 <b>1999</b> 131:24 <b>19th</b> 131:24 <b>1:03</b> 133:21 <b>1:07</b> 133:21 <b>1:17</b> 2:18 140:22	<b>2nd</b> 7:8	<b>5</b> 1:17 2:19 14:1 84:20 88:2 140:10 <b>50</b> 33:10 50:9 55:23 <b>500</b> 9:19 40:9 <b>505</b> 4:16 <b>51</b> 56:9 70:6,11 <b>5111</b> 1:23 2:21 141:23 <b>514</b> 8:22 <b>516</b> 97:10 <b>52</b> 56:2,3 <b>55</b> 97:9 <b>555</b> 10:5 12:6 <b>56</b> 40:23 <b>563-7200</b> 3:16 <b>567-6565</b> 4:8 <b>576</b> 27:7 28:3 34:6 35:16 76:2 93:2 <b>58</b> 77:7 78:11
<b>0</b>	<b>2</b>	<b>3</b>	
<b>05944</b> 1:6 2:6 <b>0921</b> 12:7	<b>2</b> 2:16 3:5 <b>2.7</b> 35:1 <b>2.8</b> 40:11 <b>20</b> 4:14 116:16 <b>200</b> 11:5 49:2 <b>20005-3807</b> 11:23 <b>2015</b> 2:19 <b>2016</b> 1:17 14:1 <b>202</b> 11:24 <b>21</b> 32:19 40:12 139:20 <b>212</b> 11:7 <b>212-3475</b> 8:24 <b>2125</b> 6:19 <b>215</b> 4:8 <b>217-6810</b> 13:8 <b>21st</b> 25:14 <b>22</b> 32:23 77:15,16 139:20,23 <b>22030</b> 5:15 <b>221-5763</b> 6:7 <b>2280</b> 3:14 <b>23</b> 111:3,7 115:23 126:15 <b>237-8562</b> 11:15 <b>23rd</b> 4:6 <b>244-7520</b> 4:16 <b>24th</b> 25:5 <b>2532</b> 6:5 <b>25th</b> 25:6 <b>27</b> 117:4 <b>2700</b> 11:13 <b>28th</b> 25:8,9 <b>2905</b> 9:12	<b>300</b> 11:13 48:25 <b>309-1761</b> 5:23 <b>30th</b> 118:9 <b>313</b> 5:23 <b>314</b> 9:8 <b>317</b> 11:15 <b>3400</b> 5:6 <b>350-0000</b> 8:7 <b>357</b> 7:8 <b>35th</b> 8:14 <b>361</b> 9:21 <b>3771</b> 8:5 <b>393-8293</b> 12:8 <b>39560</b> 8:23 <b>398-4340</b> 4:23 <b>3:07</b> 1:6 2:6	
<b>1</b>		<b>4</b>	<b>6</b>
<b>1</b> 4:6 32:16 <b>1.1</b> 31:18 <b>1.5</b> 84:17 <b>1.57</b> 67:18 <b>1.67</b> 115:2,11,16 <b>1/10/16</b> 141:20 <b>10</b> 77:16 88:1 93:2 125:3 134:10 <b>100</b> 115:7,9 <b>10166</b> 11:6 <b>1020</b> 9:19 <b>1060</b> 114:7 <b>10:09</b> 14:2 <b>11000</b> 12:15 <b>1167</b> 67:18 <b>11:34</b> 76:9 <b>11:47</b> 76:9 <b>12</b> 40:23 41:2 77:15 <b>120</b> 6:19 <b>1299</b> 10:22 <b>13</b> 124:9 <b>1449</b> 70:6,11 <b>15</b> 96:22 117:1 140:5 <b>1500</b> 2:17 3:5 <b>155</b> 6:12 <b>15th</b> 20:4 <b>16</b> 66:7 <b>1625</b> 9:12 <b>17</b> 20:5 <b>17th</b> 7:17 10:13 <b>18</b> 77:11,13		<b>4</b> 84:20 <b>40</b> 64:10 <b>40004-2400</b> 10:23 <b>4041</b> 5:14 <b>41</b> 71:2 <b>410</b> 8:24 <b>415</b> 3:7,16 5:8 6:7 6:14 7:10,19 8:16 10:7,15 12:8,17 13:8 <b>423</b> 113:25 <b>4247</b> 9:6 <b>434-8900</b> 8:16 <b>434-9100</b> 10:15 <b>439-1313</b> 10:7 <b>44</b> 5:6 <b>455</b> 12:15 <b>456</b> 7:17 <b>459</b> 56:12 58:7 61:5 <b>46204</b> 11:14 <b>473</b> 113:24 <b>48226</b> 5:22	<b>60,000</b> 77:24 <b>600</b> 4:21 <b>619</b> 4:23 <b>620</b> 5:21 <b>626-3609</b> 11:24 <b>631-3883</b> 9:8 <b>63111</b> 9:7 <b>65</b> 37:7 <b>693-0700</b> 5:8 <b>698-5200</b> 9:21 <b>6th</b> 106:22
			<b>7</b>
			<b>7</b> 88:1 102:10 <b>700</b> 4:14 <b>701</b> 11:22 <b>703</b> 5:16 <b>703-5908</b> 12:17 <b>706</b> 13:6 <b>715</b> 67:18 <b>719</b> 5:21 <b>764-8700</b> 5:16

[768 - alioto]

Page 2

768 97:9	125:21 126:12	added 25:3	affording 40:21
775 114:7	129:20 130:2,11	addition 127:9	41:4 44:3
781 8:7	absence 84:1,3	additional 98:3,13	afternoon 106:21
78401 9:20	109:10	109:10,14,18,21	ag 57:2 105:13
788-3030 7:10	absent 70:12 103:12	125:17 136:16,19	agenda 118:12
788-7210 7:19	absolute 68:10	address 18:8 24:1	agendas 56:18
797 97:9	74:14	35:6 51:22 124:1	ages 77:16
8	absolutely 64:16	134:23	aggregator 106:21
80 84:21 116:22	65:13 84:9,11 86:5	addressed 29:12	aggregators 71:2
80202-1539 9:13	126:25 129:5	35:7 51:7 113:21	ago 21:17 94:18
824 97:10	134:24	adelson 10:4 15:11	134:25
83 78:12	abuse 114:1,25	15:11	agree 40:7 45:25
87102 4:15	academic 57:11	adequacy 19:5	97:22 101:17
89121 8:6	acceptable 112:1	21:22 22:3 26:13	105:18 108:24,25
9	accepting 58:16,19	32:5 33:12 40:3,3	131:15 137:15
900 6:12	access 49:16,17	106:3 110:25	agreed 100:3 108:24
92101 4:22	102:19	adequate 26:10 28:2	agreement 39:5
925 6:21	accommodate 27:21	28:18 30:6,11 33:7	115:18 127:18
94102-7002 12:16	28:22 134:6	76:16	137:13
94103 7:9	accurate 105:18,25	adhere 111:6	agreements 26:18
94104 5:7 7:18 8:15	107:11	adjective 75:12	30:3,10
10:6	accurately 139:17	adjectives 73:7	agrees 44:22
94105 12:7	acknowledging	administration	ags 59:11 88:13
94111 3:6 13:7	23:15	111:14,16	93:22 95:11 101:1
94111-4109 10:14	acknowledgment	administrator 79:19	ahead 22:9 53:8
94114 6:13	95:16	82:15 125:21,23	71:17 73:17 86:18
94121 6:6	acquaintances	admissions 140:9	86:22 99:22 103:22
94123 3:15	16:15	adopt 27:11	113:9
945-0200 6:21	act 43:4 44:2 45:4	adopted 131:15	albeit 105:22
94598 6:20	55:16 65:15,15	adopting 49:5	albuquerque 4:15
9756270 131:23	acted 22:16	adoption 47:13	14:22
982-5267 3:7	acting 44:14 66:14	ads 80:11	alioto 3:11,12 14:8,8
986-1400 6:14	66:17	advance 21:1 96:25	20:23 21:22 22:24
9:55 2:18	action 41:9 53:14	advanced 20:17	23:18,19 26:6,14,16
a	55:15 60:8 66:6	83:9	28:15 29:9,17 32:10
a.m. 2:18 14:2 76:9	67:14 129:9 141:16	advantaged 104:20	33:3 35:5 36:1,9,11
76:9	141:17	advertisement	36:21 37:11,16,24
abandoned 21:5	actions 1:8 2:8	103:1	38:2,11,15 39:10
72:14	active 67:1	advice 100:25	45:24 51:22,25 52:6
abandoning 75:13	activity 131:11	advocacy 85:2	52:12 53:1,2,5,17
ability 106:23 118:9	actual 59:12 99:6	advocate 21:1	53:22,23 54:7 59:4
able 33:11 46:25	ad 80:12,21,21,24	advocating 21:3	59:9,21 61:9,12,20
49:12 68:2,22 78:2	add 57:6 72:17 79:2	27:19 85:4	62:4,10,25 63:5,11
	96:12 97:1	afford 60:1	63:20 67:10,24 68:4
			73:18 74:10,22 75:7

75:11 76:1,1 79:3 79:10 81:22 82:1,14 85:14 86:1 90:1,2 90:22,24 91:9 92:2 92:7,25 93:11 94:24 95:8,23,24 96:5,10 96:14,25 98:5,6,9 100:11 104:5,19 105:2,12 118:19 119:10,20 120:22 121:16 125:14 127:2 128:21,25 129:14,23 133:23 134:4,15 135:9,19 137:6,11,23 138:4,8 140:13 <b>alioto's</b> 32:12 100:9 118:25 <b>alitolaw.com</b> 8:17 <b>allegation</b> 63:11 67:3 69:11 <b>alleged</b> 59:13 62:19 136:13,13 <b>alleges</b> 45:3 <b>allocate</b> 90:9 <b>allocated</b> 94:4 <b>allocation</b> 21:12 26:13,21 27:6 28:5 28:9 29:1,7 30:7,14 30:16 39:19 81:25 86:25 87:1,8,8,9,10 87:11,18,23 89:18 89:19 94:5,5,11,15 100:22 101:1 102:16,17,23 104:5 108:15 109:3 110:22 114:2 115:7 115:25 122:22 133:6,11 134:1 <b>allocations</b> 26:25 <b>allow</b> 47:8 100:16 109:4 111:9 121:8 136:25 <b>allowance</b> 68:11	<b>allowed</b> 37:21 51:9 65:1 <b>allowing</b> 42:19 <b>allows</b> 67:6,7 115:20 119:7 <b>alternatives</b> 109:16 <b>ambivalence</b> 23:10 23:20,25 <b>amended</b> 63:4 139:13,18 <b>america</b> 114:6 <b>american</b> 44:16,17 <b>amount</b> 19:25 26:8 26:9 30:4,21 31:10 31:22 32:9,16,17,22 33:7 34:8 35:7 37:6 90:5,8,13 91:4,7 94:3,7 95:9,10,12 95:13,14 112:24 116:9 122:23 132:14,21,24 <b>amounts</b> 87:21 95:11 99:20 <b>analysis</b> 35:2 36:3,3 36:7 46:21 57:22 58:1 103:9 <b>analyze</b> 59:24 <b>analyzed</b> 46:14 <b>anderson</b> 6:10,11 18:2,2,3 <b>andrus</b> 6:10 18:3 <b>andrusanderson.c...</b> 6:15 <b>angles</b> 106:15 <b>announce</b> 17:5 <b>announced</b> 18:7 <b>answer</b> 22:8,11 23:8 50:1 53:18 61:9 63:6 75:8,14 117:20 139:11 140:1 <b>answer's</b> 64:6 <b>ante</b> 79:23 82:8 <b>antitrust</b> 1:5 2:5 44:7,8,9 46:7,23,24 47:16 48:22 65:24	<b>anybody</b> 76:11 78:17 85:20 105:8,8 123:9 <b>anymore</b> 120:16 <b>apart</b> 29:2 41:23 <b>apologize</b> 103:16 119:1,20 123:25 <b>apologized</b> 120:13 <b>apoplectic</b> 68:1 <b>apparently</b> 118:19 118:25 <b>appeals</b> 126:20 <b>appearances</b> 3:1 4:1 5:1 6:1 7:1 8:1 9:1 10:1 11:1 12:1 13:1 <b>appeared</b> 19:14 93:14 <b>appears</b> 44:1 <b>apple</b> 102:13 <b>applied</b> 45:20,21 <b>applies</b> 43:22 45:20 <b>apply</b> 43:2,5,7 133:8 <b>appoint</b> 18:23 23:6 <b>appointed</b> 20:6,15 20:20 21:11 24:8,9 24:22 71:20 129:6,8 129:10,12,15,17 130:7 <b>appointing</b> 130:2 <b>appointment</b> 24:14 131:6 <b>appreciate</b> 16:16 21:10 <b>approach</b> 28:21,25 58:5 <b>approached</b> 39:9 <b>appropriate</b> 22:18 23:12 28:4 31:1 104:25 109:11,25 116:1,17 <b>appropriateness</b> 18:22 19:1 26:4 <b>approval</b> 26:8,9 29:1 30:12 36:13,15 50:5,14 55:16,20	79:22 80:1 81:21 86:24,25 90:19 93:13,23 95:4 96:2 106:7 112:2,4 118:2 118:6 126:13 133:4 133:9,14 137:14,14 <b>approve</b> 33:18 34:7 34:22 127:21 <b>approved</b> 27:14 28:22,25 29:5,6 30:3,5 76:3 133:17 134:8 <b>approving</b> 40:25 60:20 92:16 95:20 96:20 <b>approvingly</b> 114:10 <b>arguably</b> 65:5 <b>argue</b> 70:18 <b>argued</b> 50:5,7 72:21 115:14 <b>argues</b> 124:17 <b>arguing</b> 50:5 <b>argument</b> 1:15 2:15 45:19 47:5 66:11 68:8 82:7 86:6,10 92:10,10,11 93:13 98:23 104:17 108:3 108:8,22 121:19 123:13 126:6,8 131:20 132:3,5 <b>arguments</b> 22:5 39:23 53:10 73:1 92:8 115:16 122:10 123:7 124:1 126:18 131:15 <b>arisen</b> 110:14 <b>arises</b> 46:23 <b>arizona</b> 88:3 <b>arizona's</b> 88:2 <b>arranged</b> 125:23 <b>arrangement</b> 93:25 134:6 <b>arrived</b> 54:10 94:15 <b>article</b> 47:6 64:7
---	--	--	--



[articulate - bonsignore]

Page 4

<b>articulate</b> 29:24 <b>artificially</b> 41:15 <b>aside</b> 77:14 100:18 100:19 106:15 108:6,16 112:14 <b>asked</b> 20:13,14 21:24 22:1 34:18 39:10 103:8,16 136:2 139:9,11 <b>asking</b> 23:13 82:24 106:22 132:22 137:19 139:25 <b>assert</b> 57:17 61:16 73:20 <b>asserted</b> 60:14 62:20,23,25 <b>assistance</b> 124:9 <b>associated</b> 72:20 106:9 <b>assume</b> 82:22 108:3 108:11,22 <b>assuming</b> 43:6 81:18 108:14 <b>attached</b> 49:6 95:21 <b>attacked</b> 34:3 <b>attacks</b> 68:25 <b>attempt</b> 29:23 33:1 43:1 <b>attempts</b> 72:18 <b>attendant</b> 27:1 <b>attention</b> 74:12 113:16 118:13 <b>attorney</b> 8:12,20 9:11 12:13 13:12 16:4 19:8,10 28:23 51:8 55:22 56:10,15 79:7 111:1 112:3,9 141:17 <b>attorneys</b> 3:11 44:15 55:23 56:3,17 58:8 67:7,8 70:13 93:14 123:21 <b>attributable</b> 122:6 125:6	<b>augment</b> 138:9,15 <b>authorities</b> 128:22 130:19 <b>authority</b> 24:13 47:6 48:3,4,7 53:11 53:13,15 64:5,6 <b>authors</b> 47:18 <b>authorship</b> 27:13 <b>available</b> 32:17 37:19 67:25 79:9 82:16 <b>avenue</b> 10:22 11:5 12:15 <b>avoid</b> 46:3 120:2 <b>award</b> 43:24 <b>aware</b> 37:11 56:24 64:25 68:4,6,6 101:13,23 103:11 106:24 113:20 120:5 121:12 <b>axes</b> 56:18	<b>banner</b> 80:11,21,24 <b>bar</b> 43:3 69:13 <b>bargained</b> 30:5 <b>barred</b> 66:1 <b>base</b> 122:9 <b>based</b> 53:25 54:2,2 68:2 94:4,7 99:16 103:5 106:11 108:7 108:24 109:17 111:21 116:6,18 <b>bases</b> 69:1 <b>basically</b> 72:19 115:19 <b>basis</b> 54:14 57:19,20 60:17 85:22 113:15 126:17,17,25 <b>battle</b> 58:19 83:8 86:7,10 <b>battles</b> 68:24 <b>beach</b> 8:23 <b>bear</b> 60:3 79:24 <b>bears</b> 61:21 <b>beat</b> 51:14,14 120:15 <b>beaten</b> 51:17 66:22 <b>beginning</b> 2:18 40:17 116:9,14 119:9 <b>begins</b> 46:22,22 <b>behalf</b> 15:2,9,15,18 16:3,20,22 17:14,17 17:18 18:1,3,5 62:20 68:20 99:11 102:12 110:20 126:24 128:4,8,17 128:19 129:20 130:12 <b>beings</b> 78:3 <b>believe</b> 20:5 22:1 30:7 40:16 50:4 68:24 74:22 91:9 97:2 102:16,21 103:6,13,20 104:21 104:23 106:2 120:7 120:21 127:9	139:12,23 <b>bells</b> 54:20 <b>benefit</b> 14:6 101:21 103:9 110:9,10 <b>benefits</b> 44:9,10 <b>best</b> 26:23 57:24 81:13,13 82:10 115:23 <b>better</b> 44:12 66:12 135:2,10 <b>beyond</b> 70:1 125:3 139:22 <b>bgralewski</b> 4:24 <b>big</b> 74:17 78:6 93:6 100:12 121:25 134:21 <b>billion</b> 31:18 35:1 40:11 <b>birkhaeuser</b> 6:17 17:24,25 <b>birkhauser</b> 6:18 17:25 <b>bit</b> 25:14 81:23 118:8 119:10 <b>black</b> 4:3 14:18 16:24 <b>blake</b> 94:17 <b>blame</b> 67:11 <b>blaming</b> 67:11,12 <b>blown</b> 68:10 <b>bob</b> 16:19 <b>body</b> 65:6 <b>bogdanov</b> 7:7 16:25 16:25 <b>boies</b> 5:12 15:21 <b>boies.com</b> 5:17 <b>bonsignore</b> 8:3,4 15:9,9 24:4,5,6,7,23 25:5,24 38:22 50:21 50:22 51:13,18 52:12 63:17 67:1,3 67:21 69:5,7,24 70:9 71:16 73:11 74:23 75:15 85:25 86:1 97:7,8,13,17
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[bonsignore - chance]

Page 5

131:10,12 138:5,6 138:11,16,20 139:2 <b>bonsignore's</b> 53:3 <b>bootstrap</b> 130:10 <b>boschetti</b> 1:23 2:20 141:22 <b>bother</b> 24:19 31:5 <b>botts</b> 10:19 15:15 17:16 <b>bought</b> 41:14,19 42:7 77:21 <b>boulevard</b> 9:6,19 <b>boundary</b> 42:10 <b>box</b> 111:10 <b>boyd</b> 4:12 14:21 <b>bramson</b> 6:17 17:25 <b>bramsonplutzik.co...</b> 6:22 <b>brass</b> 12:5 17:10,10 <b>break</b> 66:21 73:6 76:7 139:9 <b>breath</b> 59:19 <b>brevity</b> 40:2,2 <b>brick</b> 42:16,16,25 43:12,14,15,16,21 45:19 46:2,3 47:1,8 63:25 64:9,11,12,24 66:1 <b>brief</b> 24:25 47:16 49:9 51:3 55:11 61:25 64:22 68:8 70:8,9 77:1 78:9 87:14 90:4,10,11 91:14 97:16 103:7 125:15 129:7,16 137:6,16 <b>briefed</b> 96:18 <b>briefing</b> 75:5 98:13 99:13,14 107:25 121:12 123:20 126:19 132:6 135:5 135:7,8 137:2 <b>briefings</b> 136:2 <b>briefly</b> 50:22 51:15 51:18 63:24 80:5	97:8 124:1 129:3 131:12 <b>briefs</b> 19:15,17 48:9 52:1 60:20 67:20 76:17 123:16 137:8 137:17 <b>bring</b> 56:16 57:12 65:25 73:19 100:14 129:8 <b>bringing</b> 57:14 69:14 120:11 128:2 128:3,4,7,17,18 <b>brings</b> 98:15 <b>broad</b> 4:6 <b>broader</b> 27:9 <b>broadly</b> 133:8 <b>brought</b> 68:20 74:12 75:9 95:16 99:11 105:5 113:16 118:13 127:3 130:17 <b>burden</b> 130:22 <b>business</b> 62:1 84:14 <b>bust</b> 124:22,22 <b>buy</b> 132:17 <b>c</b> <b>c</b> 3:13 5:4 11:4 27:12 111:4 <b>ca</b> 8:15 <b>cafa</b> 55:12,20 56:9 56:12,20 61:5 93:15 <b>calculate</b> 81:5 <b>calculation</b> 56:12 94:8,9 <b>california</b> 1:2,16 2:2 2:17 3:6,15 4:22 5:7 6:6,13,20 7:9,18 10:5,6,14 12:7,11 12:16 13:7 14:1 16:4 52:19 64:22 79:7 82:3 98:20,24 99:6 101:18 102:6 103:18 104:7,12 105:3,7,19 106:4	107:4,20 108:25 111:1 112:3,9 141:2 <b>california's</b> 88:1 <b>call</b> 120:1 <b>called</b> 42:10 <b>campaign</b> 112:20 <b>cap</b> 112:1,7,8 <b>capacity</b> 21:12 128:5,19 <b>capurro</b> 3:13 14:15 14:16 38:5,9 63:13 128:11,14 129:2,3 129:14 130:5,21,25 132:2 <b>care</b> 31:6 32:23 52:14 95:6 101:1,3 130:20 <b>carefully</b> 39:5 <b>carried</b> 121:9,10 <b>cartel</b> 57:18 <b>carve</b> 88:25 95:5 <b>carving</b> 133:25 <b>case</b> 11:19 17:14 31:17 35:1 37:8,20 38:24 41:20,24 42:4 43:21 47:10 48:15 48:16,18 50:3 54:13 54:16 55:2,24 56:7 56:16 57:24 58:6,20 59:1,12 60:21 61:4 62:18 63:2 64:16,17 64:22,25 65:23 66:5 66:11 68:19,21 70:15,15,25 71:6 72:2 73:23 74:1,2 74:15 75:4,23 91:23 91:25 94:13 97:1,9 97:12 100:19 106:9 110:1,15 113:24 115:6,19 119:15,23 125:22,23 127:25 129:5,5,15,19,22 130:23 131:23 136:12 141:12	<b>cases</b> 45:24,24 47:15 48:8 51:3 53:19,25 55:8,17 57:25 64:13 65:11,14,16 70:8 74:16,18 99:16 104:16 108:1 109:18,21,23 110:12,14 112:1 126:22,23 129:6,16 136:8,9 <b>category</b> 120:10 <b>cathode</b> 1:5 2:5 <b>caught</b> 52:22 <b>cause</b> 28:19 29:20 39:6 100:10 <b>causes</b> 124:14 <b>caution</b> 20:1 75:1 <b>cbandas</b> 9:22 <b>ccorbitt</b> 5:9 <b>ccurran</b> 11:25 <b>census</b> 87:20 <b>cent</b> 108:19 <b>center</b> 2:17 3:5 10:13 <b>cert</b> 97:10 <b>certain</b> 33:19 35:5 37:13 48:15 87:19 92:22 93:14 95:1,1 118:20 121:11 134:24 135:22 <b>certainly</b> 19:13 27:19 38:13 41:17 53:25 57:3 74:11 79:20 115:19 126:14 134:15 135:1 <b>certification</b> 33:2 54:18 63:14 <b>certified</b> 2:20 55:25 56:1 63:14 141:1 <b>certify</b> 141:2,15 <b>challenge</b> 57:4 <b>challenging</b> 58:18 <b>chance</b> 19:21 53:1 58:6,9 76:13,22
--	--	---	--

136:10 <b>change</b> 20:13,14 39:14 43:7 <b>changed</b> 23:13 25:13 68:7 <b>characterization</b> 107:11 <b>charged</b> 57:1 <b>chart</b> 95:21 <b>chase</b> 63:25 <b>cheaper</b> 77:23 <b>check</b> 82:14 91:11 91:17 96:5 <b>checks</b> 108:20 <b>chief</b> 47:13 <b>chill</b> 63:18 <b>choice</b> 42:18 104:11 135:10 <b>choices</b> 84:15 <b>chose</b> 71:8 <b>chris</b> 16:21 17:6,13 <b>christi</b> 9:20 <b>christopher</b> 5:5 9:18 11:20 <b>chunghwa</b> 12:3 17:11 19:7 50:3,8 54:16 86:13,16 87:2 87:2,7,13,18 89:9 89:14,18,20,22 90:6 90:17,19 91:23 92:16 93:13 94:25 95:18,20 96:20 121:23 124:2,18 125:1,2 134:6,9,14 135:14 136:7,23 140:9 <b>chunghwa's</b> 124:8 <b>cihlar</b> 5:13 15:21,21 <b>circuit</b> 42:4 44:5,6 48:15,19 64:17 65:21 66:1,4 97:9 110:12,15 113:18 113:20,23,25 114:11 131:24	<b>circuits</b> 65:21 113:18,20 <b>circumstances</b> 42:8 118:10 120:3 <b>citations</b> 49:21 114:17 136:11 <b>cite</b> 90:10,11 114:19 129:7,16 131:23 136:16 <b>cited</b> 27:15 36:12 47:15,16 48:9,16,24 48:25 51:2 64:16 65:18,21 91:14 97:15 114:9 126:23 130:20,22,23 <b>cites</b> 139:15 <b>citing</b> 45:24 49:4,9 70:7 <b>citizens</b> 101:3 <b>claim</b> 19:9 33:4 35:20 42:13,14,24 43:12,20 44:13 46:7 46:8 47:9 48:1,8 50:9 57:13,14,17 58:9 59:23,24 60:11 61:14 62:12,14,19 62:22 64:4,12 65:25 66:1,16 67:4 68:19 69:1,2,10,12,14,22 71:13 72:24 73:13 73:21 89:8 97:3,4 98:16 100:10 102:12 103:19,22 104:8,14 105:5,10 106:1 108:9 109:12 111:4,7 116:21,25 121:7,8 125:20 126:5 136:20 139:22 <b>claim's</b> 103:21 <b>claimant</b> 34:20 <b>claimants</b> 27:8 32:15 56:1 60:9 73:25 74:16 104:13 105:20,20 106:4	109:15 111:22 113:14 114:3 115:3 116:8,17 125:21,24 <b>claimed</b> 98:21 126:4 139:19 <b>claims</b> 30:22 32:6,7 32:10,11,15,23 33:3 33:12,22,24 34:20 39:1,2 40:4,6,20,22 41:2,2,5 43:15,16 43:18 45:8 46:4 48:5,14 50:23 51:1 51:9 53:16 54:1,9 55:8 57:9 58:17,21 58:22 59:11,12,13 59:14,16 60:2,5,6,6 60:10,13,15 65:2 67:5 71:21,25 72:1 72:1 73:12,19,21 78:4,7,8 79:4,18,19 81:24 87:21 98:20 98:22 99:10,11 100:2,6,12,17,18,19 101:19 102:10,19 103:3,8 104:4,6,10 104:25 105:6 106:23 107:25 108:16 109:7,19 110:4,7,16 111:14 111:16,19,21 112:21,24 116:4,7 116:18 117:11,13 117:23 120:18,19 120:23 124:13 125:22,23 126:3,12 132:18 134:12 139:12 <b>clarification</b> 88:11 <b>class</b> 3:10 13:3 19:2 19:3,4 20:7 32:24 33:1 34:13 35:19,22 40:12 41:9,12 42:6 43:8 54:18 55:15 57:20 60:7 61:22 63:14,14 65:1,24	66:5,6 67:14,15,17 70:11,12,14 71:14 74:3 77:9,25 88:15 88:16 89:6 91:12,18 91:22 96:7,8 97:22 98:1 100:6 101:22 105:20 111:12 116:10 122:6 124:4 124:12,13,17 125:6 127:6,10,13,16 128:5,19 129:6,8,8 129:10,12,15,17,17 129:20 130:16 131:14 139:20 <b>classactions.us</b> 8:8 <b>classes</b> 55:25 56:1 59:13 75:17 110:8,9 <b>clause</b> 113:4 <b>clayton</b> 7:16 17:2,2 44:2 65:15 <b>clear</b> 23:8 32:8 53:7 54:12 90:4 91:14 100:4 126:22 139:11,14 140:1 <b>clearly</b> 114:6 <b>clerk's</b> 37:18 <b>click</b> 80:22 <b>clicks</b> 78:19 <b>client</b> 57:12 62:12 74:23 75:22 97:21 126:16,22 127:20 127:21,24 128:17 128:19 <b>clients</b> 52:17 74:4 128:4,8 <b>close</b> 29:14 58:12 <b>closed</b> 103:21 <b>closer</b> 111:23 <b>closest</b> 127:4 <b>cmicheletti</b> 5:10 <b>cogently</b> 67:20 <b>cognizable</b> 45:8 <b>cognizant</b> 130:15 <b>cohen</b> 13:12 14:13 19:15 133:19
--	---	---	---

137:18,21 <b>colleague</b> 63:21 <b>colleagues</b> 98:19 <b>collected</b> 44:4 <b>collectively</b> 30:4 <b>colorable</b> 50:9 <b>columbia</b> 139:21 <b>combined</b> 54:17 <b>come</b> 28:17 29:13 30:8 34:17 42:2 43:1 59:14 61:24 76:7 78:23 85:19 100:12,21,25 106:14 107:9 110:2 114:4 115:8 119:24 123:11 126:12,16 <b>comes</b> 18:8 45:3 94:2 <b>comfortable</b> 135:16 <b>coming</b> 42:4 44:15 61:1 88:15 101:10 <b>comments</b> 19:18 <b>commerce</b> 31:21 <b>commitments</b> 95:17 <b>common</b> 46:4 51:1 82:11 <b>communications</b> 119:22 120:6 <b>companion</b> 105:21 <b>company</b> 70:6 <b>comparability</b> 35:8 <b>compare</b> 35:22 <b>compared</b> 40:10 <b>compensation</b> 31:2 39:20 <b>competition</b> 44:18 <b>competitive</b> 41:22 <b>competitors</b> 85:9 <b>complain</b> 70:18 101:4,5 112:10 <b>complaint</b> 63:4 75:19,19 139:13,18 139:19,22,24 <b>complaints</b> 62:17 73:22 136:12	<b>complete</b> 53:24 82:4 101:22 138:22 <b>completely</b> 34:6 62:11 108:18 <b>completion</b> 141:13 <b>complies</b> 18:10 <b>component</b> 61:21 <b>comprehensive</b> 55:22 56:2 91:24 133:13 <b>compromise</b> 112:16 <b>compromised</b> 58:10 <b>compute</b> 40:14 <b>comscore</b> 81:3,8,8 <b>concept</b> 60:4 <b>conceptually</b> 81:24 <b>concern</b> 28:19 106:13,16,17 <b>concerned</b> 135:13 <b>concerns</b> 27:22 29:15 <b>conclusion</b> 28:17 61:24 114:5 129:21 <b>concocted</b> 53:12 <b>confess</b> 86:14 <b>confidential</b> 38:1 <b>confirm</b> 121:8 <b>confirming</b> 94:19 <b>confused</b> 60:4 86:14 121:1 140:8 <b>confusing</b> 136:3 <b>confusion</b> 49:10 94:2 <b>congratulated</b> 140:6 <b>connection</b> 95:18 <b>consensus</b> 29:24 <b>consequences</b> 107:7 107:8 126:18 <b>consider</b> 28:4 34:5 51:16 77:3 114:1 123:8 129:1 130:18 131:25 139:5 <b>considerably</b> 132:20 <b>consideration</b> 30:23 60:9 115:17	<b>considered</b> 34:2 69:11 79:25 <b>considering</b> 48:9,20 82:24 <b>consistent</b> 134:19 <b>conspiracy</b> 31:18 41:23 124:22 <b>constitutional</b> 93:7 <b>constraints</b> 138:25 <b>constructive</b> 30:1 104:23 <b>consultation</b> 27:4 57:23 135:19 <b>consumer</b> 51:2 <b>consumers</b> 68:20 <b>consuming</b> 126:20 <b>contacted</b> 106:20 <b>contemplated</b> 95:25 <b>contemplation</b> 107:18 <b>contest</b> 57:3 106:2 <b>contested</b> 94:1 115:22 <b>context</b> 47:7 102:23 <b>continually</b> 116:7 <b>continue</b> 116:6 <b>continued</b> 4:1 5:1 6:1 7:1 8:1 9:1 10:1 11:1 12:1 13:1 <b>contract</b> 20:23 <b>contracts</b> 30:3 77:14 <b>contractual</b> 93:25 <b>contrary</b> 65:17 73:2 91:15 <b>control</b> 70:12,17 <b>controlling</b> 64:17 <b>conversations</b> 119:7 <b>convey</b> 44:9,11 <b>cooper</b> 7:4,5 15:2,4 15:4 16:25 20:2,9 21:18 22:11 23:1,8 23:15 24:17,25 25:8 32:1,5 37:10,17 38:1,7 63:6,8,16 82:22 83:3,21 84:24	85:12 86:18,19,22 88:4,8,18,20,23 89:6,12 95:9 96:7 96:23 118:14,15,25 119:2 120:5,15 121:11 126:8 127:4 127:8,14 128:7,9 132:6 135:8,11,18 135:22 137:4,10,20 138:1 140:7,8,16,19 <b>coopkirk.com</b> 7:11 7:12 <b>copies</b> 62:16,17 136:24 137:12 <b>corbitt</b> 5:4 15:19,20 <b>core</b> 53:10 <b>corners</b> 106:15 <b>corp</b> 97:13 <b>corporate</b> 124:19 <b>corporation</b> 131:22 <b>corporations</b> 78:6 104:20 108:17 109:6 <b>corpus</b> 9:20 <b>correct</b> 31:3,9 44:20 52:6 59:3 65:9 69:20 84:6,10,11 102:8 107:17 122:2 123:4 125:9 127:7,8 128:1,6 134:3 139:24 <b>corrected</b> 52:22 70:2 <b>cost</b> 84:20 97:25 110:3 <b>costs</b> 98:2,4 <b>counsel</b> 14:9 16:6 18:4,23 20:6,15 21:12,12 22:6,21 24:22 25:4,14 27:3 30:16 33:1 38:2,18 53:20 57:23 67:13 68:23 69:21,24 70:12,15 71:10,11 71:12,15,19,19,19
---	--	---	--

72:19,20 73:15 76:19 97:22 111:12 118:23 119:7 124:4 124:12,17 125:6 126:11 127:9,24 128:5,19 129:5,6,8 129:10,12,15,17,18 130:2,8 131:5,6,7 132:13 <b>counsel's</b> 40:5 73:19 98:1 121:19 122:6 <b>country</b> 30:22 31:12 31:12,13 32:8 64:23 <b>couple</b> 61:1 63:22 94:18 104:23 105:16 110:21 114:4 121:14 <b>course</b> 30:22 57:7 112:12 135:2 <b>court</b> 1:1 2:1 14:6 18:9 20:13,25 21:15 23:21 25:12,15 35:15 38:16,17 42:17 43:1,6,24 45:3,21,22 46:5,12 46:13 47:2 49:8 51:7 59:19 64:15 79:21 81:18 82:8,11 85:1 86:5 96:2 98:24,25,25 99:22 103:15,17 104:1,15 105:25 106:10,16 109:17 111:18 112:2 113:12,19 115:12,15 117:14 121:7,8 124:8 129:6 129:7,9,11,14,17,25 130:15,17,18 131:24 134:8 <b>court's</b> 130:10 136:5 <b>courthouse</b> 41:6 43:3 75:18 <b>courts</b> 45:14 114:4 114:22	<b>cover</b> 18:18 76:14 <b>covered</b> 18:16 118:11 <b>craft</b> 39:5 <b>craig</b> 5:4 15:19 <b>create</b> 27:25 28:12 72:1 98:19 <b>created</b> 86:15 125:2 <b>creates</b> 87:21 <b>creating</b> 111:13 <b>creek</b> 6:20 <b>critical</b> 44:16 138:7 <b>criticism</b> 101:16 <b>criticized</b> 101:24 <b>crowd</b> 16:9 <b>crt</b> 1:5 2:5 <b>crt's</b> 77:21 <b>crucial</b> 91:17 126:15 <b>crutcher</b> 12:4 <b>crystal</b> 100:4 <b>csr</b> 1:23 141:23 <b>cure</b> 72:18 93:4 <b>cured</b> 91:23 <b>curran</b> 11:20 17:14 <b>current</b> 87:24 <b>currently</b> 127:6 <b>cut</b> 39:3,8 63:25 115:3,4 <b>cv</b> 1:6 2:6 83:12 <b>cy</b> 101:20 107:14,15 108:25 109:13 110:6,17 113:6,15 113:21 114:1,9 115:9 <b>d</b> <b>d</b> 7:7 8:12,13 <b>d.c.</b> 10:23 11:23 <b>damage</b> 35:2 37:12 40:11,12 42:1 44:23 62:7 110:9 112:7,8 114:2,24 116:14 <b>damages</b> 34:19 36:16,17 37:7 57:19 62:20 67:6,8 108:7	108:10,12,18 109:5 110:23 111:23,24 112:1 114:10 115:1 115:3,17,20 116:13 116:16 139:19,22 <b>dan</b> 17:24 <b>dandy</b> 84:8 <b>daniel</b> 6:18 <b>daniels</b> 11:11 <b>data</b> 79:4 80:15,23 80:25 81:2,3,7 87:20 102:20 103:8 107:25 109:3,3,10 109:20 111:17,19 116:5,18 <b>database</b> 78:23,23 <b>date</b> 25:9,13 89:15 111:22 118:7 138:25 141:18 <b>dated</b> 141:20 <b>daubert</b> 38:10,12 <b>day</b> 34:23 81:6 94:18 108:6 <b>days</b> 21:17 94:18 138:2 <b>dbirkhaeuser</b> 6:22 <b>de</b> 23:24 <b>dead</b> 51:14,15 <b>deadline</b> 19:9 82:3,5 98:16 99:1,1,1 103:21 104:6,11 105:1,7 106:5,6 107:2,4 111:18,19 116:7,25 117:12,23 <b>deadlines</b> 106:1 <b>deal</b> 75:24 76:8 93:25 104:24 107:6 118:10 129:25 130:1 133:16 <b>dealing</b> 48:11,13 133:24 <b>dealt</b> 47:11 <b>death</b> 66:22 <b>debate</b> 52:19 57:8,9 57:11,11	<b>debated</b> 20:9,11 23:11 <b>december</b> 25:5,8,9 102:10 106:22 <b>decide</b> 21:19 101:9 <b>decided</b> 84:13 131:23 <b>decides</b> 23:6 <b>decision</b> 46:19 47:12 47:23 54:13 57:5 69:13 75:2 82:10 109:24 114:6,7,9 115:1 <b>decisions</b> 57:2 74:6 <b>decisive</b> 138:8 <b>declaration</b> 76:19 80:7,16 111:4 136:19 <b>declarations</b> 76:20 123:21 <b>decline</b> 77:20 <b>deduct</b> 97:25 98:2 <b>deemed</b> 87:24 <b>defect</b> 72:18,21 <b>defects</b> 29:8,10 <b>defendant</b> 55:17 56:2,9,11 124:19 <b>defendants</b> 10:2,10 10:18 11:2,10,18 12:3 15:14,16,18 17:9,9,11,15,17 20:19 26:9 28:2,8 29:6,19,21,23 30:10 31:5 42:19 44:4 50:4,15 52:4 55:9 55:15 56:8,9 57:18 58:20 59:5 62:2 68:17,21 69:1,3,12 72:21 100:3,8 124:21 129:25 132:11 133:11 <b>defense</b> 29:24 <b>defer</b> 26:11 <b>deficiencies</b> 102:21
---	--	--	--

[definitely - effectiveness]

Page 9

<b>definitely</b> 136:24 <b>delay</b> 21:7 23:23 <b>delayed</b> 21:7 <b>demand</b> 70:3 72:19 73:2 120:3 <b>demonstratively</b> 40:21 <b>denied</b> 97:10 103:10 <b>denver</b> 9:13 <b>department</b> 12:12 56:3,11 58:8 <b>depending</b> 35:20 <b>deposition</b> 37:15,23 37:25 38:1 141:12 <b>deserving</b> 30:11 <b>designated</b> 21:1 <b>designation</b> 20:19 22:6,21 <b>designee</b> 53:1 <b>despite</b> 42:13 47:7 <b>determination</b> 41:7 41:8 98:11 113:13 116:6 <b>determine</b> 29:10 98:9 <b>detroit</b> 5:22 <b>development</b> 47:15 <b>devices</b> 32:25 <b>devised</b> 27:3 <b>dictate</b> 75:22 <b>dictatorship</b> 70:17 <b>diego</b> 4:22 <b>difference</b> 21:6 23:4 42:9 58:15 87:25 104:16 <b>differences</b> 89:17 <b>different</b> 27:18 29:12 30:20 32:2 33:1 35:20 59:10,11 59:12 68:24 75:12 83:5,7,14,18 85:6 89:21 100:25 103:3 110:8 <b>differently</b> 54:25 83:15,19 138:21	<b>difficult</b> 57:20 99:4 <b>digital</b> 80:8,13 81:1 <b>diligence</b> 21:14 <b>direct</b> 13:3 16:6,11 54:23 55:2,3 60:21 100:16 108:13 125:24 <b>direction</b> 28:11 141:8 <b>directly</b> 106:21 119:2 <b>directs</b> 34:12 <b>disadvantage</b> 107:20 <b>disagree</b> 112:18 <b>disapprove</b> 88:23 <b>discovery</b> 21:14,24 22:1 <b>discretion</b> 53:20 106:1 114:1,25 117:14 <b>discuss</b> 19:13 35:10 <b>discussed</b> 110:24 <b>discussing</b> 111:11 113:17 <b>discussion</b> 120:17 <b>discussions</b> 74:1,3,4 99:17 120:19 136:1 <b>disgorgement</b> 47:3 48:18 64:3,12,18 65:6 66:4,7 <b>dismiss</b> 68:22,25 69:4 <b>dismissed</b> 40:24 62:23 63:1 69:10 <b>disparate</b> 98:20 105:9 <b>disparities</b> 134:7 <b>disparity</b> 41:12 <b>dispassionately</b> 73:7 <b>disposed</b> 124:12 <b>dispute</b> 124:7,8 <b>disputing</b> 132:2 <b>dissemination</b> 55:7	<b>distinction</b> 59:16 60:18 105:24 <b>distinguished</b> 106:11 <b>distinguishing</b> 105:19 112:17,19 112:23 113:6 <b>distribute</b> 91:5 113:14 <b>distributed</b> 27:8 71:3 95:10 107:19 107:24 <b>distributing</b> 89:22 <b>distribution</b> 52:9,10 88:12 95:6 108:13 114:1 116:4,8 134:8 134:9 <b>distributions</b> 88:9 115:9,20 118:18 <b>district</b> 1:1,2 2:1,2 36:14 64:22 75:20 96:2 105:25 139:21 <b>divided</b> 87:19 92:22 <b>docket</b> 49:9,14,22 49:23 62:16 136:11 139:15 <b>document</b> 1:7 2:7 91:12,17 111:5 <b>documents</b> 55:24 135:19,20 136:24 137:11,15 <b>dog</b> 93:3 97:23 <b>doing</b> 20:16 21:25 38:25 41:3 59:19 82:1 98:19 126:25 <b>doj</b> 124:19,20,24 <b>doj.ca.gov</b> 12:18 <b>dollar</b> 33:9 37:6 40:10 79:5 <b>dollars</b> 71:3 90:7 <b>domain</b> 56:25 <b>don</b> 16:23 <b>donald</b> 4:5 <b>door</b> 41:6 43:4	<b>douglas</b> 8:19 15:25 <b>downside</b> 106:12 107:2 <b>dozen</b> 39:10 <b>dperelman</b> 4:10 <b>dr</b> 40:10,16 <b>dram</b> 47:14 49:13 49:22 78:23 125:22 125:23 <b>drive</b> 5:14 8:5 <b>dropped</b> 61:2 <b>due</b> 21:13 25:9 27:20 40:22 41:4 76:4 93:7 103:2 111:3,6 115:22 <b>dug</b> 27:13 39:14 <b>duly</b> 141:6 <b>duncan</b> 4:4 14:17,18 63:23,24 64:3,16,21 65:4,9,13,16,20 66:3 79:11,13,14,14 80:19 81:22 83:10 <b>dunn</b> 12:4 <b>duration</b> 31:19 <b>duties</b> 128:6 <b>duty</b> 71:9,11,15,20 71:23,25 130:16
<b>e</b>			
<b>e</b> 6:18 <b>eadelson</b> 10:8 <b>earlier</b> 125:16 <b>early</b> 77:9,11 99:19 124:12 <b>easily</b> 62:17 136:12 <b>easy</b> 49:17 105:3,11 <b>economic</b> 39:7 44:17 <b>editors</b> 47:18 <b>effect</b> 35:25 40:25 41:1 64:23 91:25 122:4 <b>effective</b> 126:3 <b>effectiveness</b> 80:4			



<b>effectuate</b> 26:23 <b>efforts</b> 122:7 <b>eight</b> 55:10 58:7 61:5 116:21 <b>eighth</b> 114:11 <b>either</b> 25:5 62:19,21 86:20 104:3,4 119:14 121:5 <b>electronic</b> 113:10 <b>eliminate</b> 100:9 <b>eliminated</b> 86:11 <b>eliot</b> 10:4 15:11 <b>ellis</b> 10:3 15:11 <b>elongated</b> 85:16 <b>eloquence</b> 40:2 <b>eloquent</b> 39:24 40:1 <b>email</b> 18:8 38:17,23 54:21 118:19,22 119:13,14 120:9 123:1 125:21,24 <b>emails</b> 68:7 118:22 138:11 139:2 <b>embarcadero</b> 2:16 3:5 10:13 <b>emilio</b> 12:14 16:3 <b>emilio.varanini</b> 12:18 <b>emphasize</b> 61:12 <b>emphasizing</b> 124:18 <b>employee</b> 141:16 <b>encompassed</b> 67:17 <b>encourage</b> 99:15 <b>encouragement</b> 117:12 <b>endorsed</b> 44:6 <b>enforcement</b> 44:11 56:13,17,19 57:4 <b>engine</b> 80:10 <b>enrichment</b> 45:16 45:25 46:4,5,8 48:14 <b>entered</b> 20:24 30:3 133:5 <b>enterprising</b> 106:21	<b>entire</b> 22:24 127:10 129:20 <b>entirely</b> 86:10 108:12 <b>entirety</b> 122:8 <b>entitled</b> 43:11 86:1 87:24 93:22 <b>entity</b> 47:11 <b>enunciating</b> 42:20 <b>equitable</b> 43:19 44:13,21 45:9,17 47:2,9 48:21 50:6 62:9,20 65:25 106:1 <b>equity</b> 44:2 <b>erik</b> 10:20 15:15 <b>erik.koons</b> 10:24 <b>error</b> 70:22,22 97:22,25 <b>escrow</b> 132:12,16 <b>especially</b> 24:13 52:18 77:8 85:22 <b>esq</b> 3:12,13 4:4,5,13 4:20 5:4,5,13 6:4 7:5,6,7,15,16 8:4,13 8:21 9:5,18 10:4,12 10:20,21 11:4,12,20 11:21 12:5,14 13:5 13:12 <b>essential</b> 26:19 <b>essentially</b> 21:17 34:5 41:3 50:6 <b>establish</b> 42:24 57:19 <b>established</b> 40:7 <b>estoppel</b> 121:22 124:2,16 <b>evade</b> 108:4 <b>evaluate</b> 22:15 33:11 37:9 82:8 85:5 <b>evaluating</b> 97:11 <b>event</b> 111:17 131:16 <b>eventually</b> 74:5 <b>everybody</b> 19:22 27:18 31:14 50:10	104:18 110:6 140:4 <b>everybody's</b> 49:15 <b>evidence</b> 33:19 34:1 34:13 41:15,21,24 41:25 42:17,19,22 42:23 45:20 53:7 55:25 68:3,3 77:6,7 78:11,13,16 80:6 104:22 138:7,21 <b>evidently</b> 79:9 <b>ex</b> 79:23 82:8 119:7 120:6 <b>exact</b> 132:21 <b>exactly</b> 34:19 40:25 92:10 102:14 <b>example</b> 22:13 40:9 80:10,13 88:3 103:4 117:24 <b>exceed</b> 135:24 137:16,17 <b>exceeds</b> 111:12 <b>exception</b> 43:12 95:6 <b>exceptions</b> 43:14,15 <b>exchange</b> 118:19 119:13,14 <b>excluded</b> 8:2 15:10 24:16 31:22 39:4 67:5 86:3 88:10 97:6 <b>excluding</b> 123:5 <b>exclusivity</b> 100:8 <b>excuse</b> 15:10 34:11 52:21 53:8 <b>exercise</b> 53:20 <b>exhaustively</b> 79:25 <b>exhausts</b> 108:11 <b>exhibit</b> 37:23,24 111:4 <b>exhibits</b> 80:8 <b>exist</b> 64:12 <b>existed</b> 72:11 <b>existence</b> 87:1 <b>exists</b> 95:17	<b>expect</b> 81:18 <b>expectation</b> 90:15 <b>expense</b> 123:10 <b>expensive</b> 126:20 <b>experience</b> 120:20 <b>experienced</b> 110:13 <b>experiences</b> 120:23 <b>expert</b> 22:14 34:25 36:3 77:3 82:23 83:11,14,23 84:2,5 84:23 85:1,18,19,21 <b>expert's</b> 22:15 <b>experts</b> 27:4,4 83:8 85:3 86:7,10 <b>explained</b> 81:7 <b>explaining</b> 137:4 <b>explicitly</b> 44:6 114:23 <b>exposure</b> 106:13 <b>expressed</b> 104:19 <b>extend</b> 98:16 99:1 104:6,17,25 105:7 106:1 107:3 116:6 117:22 <b>extended</b> 19:10 82:4 116:25 <b>extending</b> 82:3 104:10 107:2 <b>extends</b> 111:18 <b>extension</b> 106:5,6 117:11 <b>extensive</b> 54:21 73:24 80:3 112:20 <b>extensively</b> 69:2 129:4 <b>extent</b> 27:10 28:20 60:12 79:24 82:4 122:17 134:16 <b>extra</b> 109:13 <b>extraordinarily</b> 132:24 <b>extreme</b> 75:1 <b>eyeballs</b> 102:25
--	--	---	---

[f - fought]

Page 11

<b>f</b>	<b>fashioning</b> 60:8	<b>filing</b> 26:7 52:16	<b>fisher's</b> 80:7,15 83:7
<b>f</b> 1:23 2:19 5:20	<b>fast</b> 124:4	64:11	<b>five</b> 18:17 135:24,25
141:22	<b>faulty</b> 28:6	<b>final</b> 30:11 50:5,14	137:4,16,17
<b>f.3d</b> 67:18 70:6,11	<b>favorably</b> 101:14	70:20,20 81:20,20	<b>fix</b> 29:7 72:21,22
97:9 113:24 114:7	<b>fbdlaw.com</b> 4:17	87:7 90:19,23 91:7	98:4,7 99:18 105:11
<b>fabulous</b> 85:7	<b>fears</b> 104:20	91:10 92:11,15,18	<b>fixed</b> 32:16 41:14
<b>face</b> 102:18,20 103:5	<b>features</b> 113:6	96:2,6 104:9 106:7	73:3 87:21
103:13 109:2	<b>federal</b> 43:24 44:22	111:17 112:2,4	<b>fixing</b> 65:24 77:18
<b>faced</b> 42:17	45:3,22,22 46:11,11	116:2 118:2 120:24	98:7
<b>facilitate</b> 106:22	46:14,17,18,23 47:7	120:24 121:4	<b>flawed</b> 78:25
<b>facing</b> 21:8	47:9 48:17 49:8	125:14 133:4,4,9,14	<b>flaws</b> 83:24 84:1
<b>fact</b> 36:2 40:8 41:22	50:9 53:13 64:3,11	137:14	<b>floor</b> 4:6 5:14 7:8,17
44:6 51:3,7 68:9	64:19 65:15 75:18	<b>finally</b> 20:22 69:9	8:14 10:13
72:4 74:14 75:16,25	99:22 102:7 108:24	136:23	<b>focus</b> 53:4 59:16,23
78:22 94:17 124:14	141:12	<b>financially</b> 141:15	99:25 123:2
130:6 134:17	<b>fee</b> 21:25 122:9	<b>find</b> 41:10 50:17,19	<b>focused</b> 46:10,11
<b>factors</b> 28:3 60:22	123:9 125:7	62:17 63:4 71:25	125:19
112:17,19,24 122:6	<b>feed</b> 81:3	78:5 81:15 90:10	<b>folks</b> 38:19 100:1
<b>facts</b> 53:24 59:25	<b>feel</b> 22:20 135:16	93:3 97:9 106:17	109:11
60:3	<b>feeling</b> 107:1	109:14 129:4	<b>follow</b> 23:3
<b>factual</b> 41:12 42:13	<b>feels</b> 27:10 104:25	134:13 136:12	<b>follows</b> 46:17
42:14 43:25 132:18	109:25	<b>fine</b> 4:3 14:18 16:23	110:11
<b>faegre</b> 11:11	<b>fees</b> 67:7,8 98:1	79:15 99:14 133:7	<b>foregoing</b> 141:3,5,9
<b>faegrebd.com</b> 11:16	112:24 122:18,22	137:10	141:11
<b>failed</b> 119:16	122:23 123:6	<b>finekaplan.com</b> 4:9	<b>forestalling</b> 116:8
<b>failure</b> 39:19 69:10	<b>fell</b> 41:23	4:10	<b>forget</b> 57:6 85:14
<b>fair</b> 19:22 26:10	<b>felt</b> 28:20 32:10	<b>finger</b> 84:25	86:17
27:21 28:2 30:6,11	42:18 75:23	<b>finish</b> 136:7	<b>form</b> 22:4 77:13
61:18 102:22 103:5	<b>fiduciary</b> 71:15	<b>finished</b> 16:12	105:23
103:7 105:6 113:9	128:6 130:15	<b>finn</b> 9:3 17:18,22	<b>formal</b> 119:11
122:14 128:9	<b>fifth</b> 5:14 19:8	18:5	125:20
138:24	<b>figure</b> 84:19 94:15	<b>firm</b> 9:4,17 15:5	<b>formally</b> 63:1 68:12
<b>fairfax</b> 5:15	99:5	105:15 127:5,17	<b>former</b> 84:12
<b>fairly</b> 87:17	<b>file</b> 75:18,23 100:2	<b>first</b> 4:14 18:19,19	<b>formerly</b> 127:6
<b>fairness</b> 18:25 26:12	101:18 103:22,25	25:12 26:4 30:9,19	<b>formula</b> 89:21
55:16	105:6 106:23	33:13 46:2,14 82:18	<b>forth</b> 20:10 94:8
<b>fall</b> 43:16	108:16 138:14	90:3 105:16,18	141:4
<b>false</b> 68:10	139:4,8	109:15 110:24	<b>fortman</b> 9:3 17:19
<b>familiar</b> 67:8	<b>filed</b> 20:11,11,22	114:25 117:9	17:22 18:5
<b>family</b> 77:21	24:11 36:12 37:17	125:11 132:23	<b>forward</b> 57:17
<b>far</b> 47:21 100:2	37:17,18 38:6,15	134:23 139:9	73:20 75:2 102:2
114:8 118:5	49:7 50:13,14,15	<b>fisher</b> 76:20 77:8	118:9
<b>fashion</b> 64:25	68:21 73:12,13,22	78:12 81:3,6 83:11	<b>fos</b> 7:20
133:13	81:20 108:9 120:25	83:25,25 84:12	<b>fought</b> 68:23
	121:2 128:12 130:7	85:10 136:19	

[foul - ground]

Page 12

<b>foul</b> 93:4 <b>found</b> 29:8 73:4 113:25 114:23 <b>foundational</b> 33:19 <b>four</b> 10:13 62:17 136:12 <b>fourth</b> 19:6 63:3 139:13,18 <b>framing</b> 24:18 <b>francis</b> 7:14,15 15:6 15:7 17:3 76:25 <b>francisco</b> 1:16 2:17 3:6,15 5:7 6:6,13 7:9,18 8:15 10:6,14 12:7,16 13:7 14:1 15:8 <b>frank</b> 17:13 117:16 <b>free</b> 42:11 123:13 <b>freedman</b> 4:12 14:21 <b>friday</b> 137:9,17,19 138:3,4 140:10,12 140:15,15,17 <b>friends</b> 16:8 <b>front</b> 93:21 103:11 109:9 <b>fuel</b> 97:14 <b>full</b> 19:22 51:25,25 53:19 98:10 109:7 110:7 114:24 135:14,16 <b>fund</b> 108:11,14 <b>fundamental</b> 40:19 <b>fundamentally</b> 41:6 42:17 133:16 <b>further</b> 125:17 141:11,15 <b>furtherance</b> 128:5 <b>future</b> 93:19 136:1	<b>gary</b> 8:11 <b>gate</b> 12:15 <b>gathered</b> 73:21 <b>geagan</b> 11:4 15:17 15:17 <b>general</b> 12:13 19:9 19:10 28:23 29:24 30:14 44:15 51:8 55:23,23 56:3,10,17 58:8 79:8 93:14 97:13 101:14 111:1 112:3,10 133:10 <b>general's</b> 16:4 <b>generally</b> 37:19,19 41:9 88:8 106:2 <b>generals</b> 56:15 <b>generating</b> 103:3 <b>gentlemen</b> 102:24 <b>geographic</b> 42:10 <b>germane</b> 79:22 <b>getting</b> 30:2 31:9 35:24 92:1 93:19 99:25 115:16 116:18 118:17 119:4,9 134:18 <b>ghost</b> 108:23 <b>gibson</b> 12:4 <b>gibsondunn.com</b> 12:9 <b>gidley</b> 11:21 <b>gin</b> 109:19 110:4 <b>ginning</b> 112:21 <b>gist</b> 93:12 <b>give</b> 18:15 19:21 24:15 31:14 47:2 48:15,17 51:24 53:1 53:18 54:8 62:16 76:13,22 85:5 89:4 91:1 97:12 100:8,9 100:25 101:20,21 103:8 108:17,20 109:4,5 117:7 130:11 133:19 136:10,11,15 138:18	<b>given</b> 24:13,14 28:3 52:3,3 54:23 56:25 60:25 71:20 81:7 96:18 98:21 104:16 105:6 106:3 113:13 116:9 134:16 141:10 <b>gives</b> 130:25 <b>giving</b> 60:9,9 90:20 108:6 134:11 <b>glad</b> 127:3 <b>global</b> 57:18 132:17 132:25 <b>gmail.com</b> 8:25 9:14 <b>go</b> 18:13 22:9 29:6 33:6 37:1 38:17 45:25 46:1 49:13 52:24 53:6,8 57:22 59:8 61:15 70:4 71:12,13,13,17 73:17 75:1,18 84:13 85:21 86:17,22 87:16 93:17,18 95:11 101:5 103:12 103:22 109:13 113:5,9,21 114:23 114:25 115:20 116:3 135:23 <b>goal</b> 27:9,13 <b>goes</b> 47:25 49:2 58:1 68:19 74:18 <b>going</b> 16:12 20:5 23:23 24:19 30:14 32:13,20 33:6,9,10 35:21 36:13 39:7,14 41:23 46:6,6,9 47:8 51:20,22 52:16,20 53:6 54:4,5,7 55:10 55:18,19 56:16 57:17 63:18 73:5,6 73:10,14 76:6 77:2 78:8 79:11,21 80:1 82:9 85:20,23 92:8 94:7,16,20,22 95:13 96:3,5,25 98:25	99:22 100:10 101:4 101:5,15,19,24 107:23 108:5,10 110:3,10 111:21,23 114:7,13 116:18,25 119:2,5 120:11 122:17 123:11,17 126:19 131:8 133:6 133:14 134:17,18 135:1 136:5,6,8,9 136:15 138:14,18 139:15,16 <b>gold</b> 140:18 <b>goldberg</b> 4:12,13 14:20,21,22,25 16:9 59:3 101:12 139:6,7 139:7 140:11 <b>golden</b> 12:15 <b>good</b> 14:5,7,8,15,17 14:20 15:1,19 23:7 39:12 60:7 61:3 79:1 83:10 88:3 99:25 131:18 <b>google</b> 80:10,10,11 80:11,12,20,20 <b>goose</b> 42:20 <b>gosh</b> 82:11 <b>gotten</b> 35:23 60:15 60:16 102:6 119:11 <b>government</b> 65:6 <b>governmental</b> 47:11 <b>governments</b> 65:5 <b>grain</b> 39:9 <b>gralewski</b> 4:20 16:19,19 <b>grand</b> 9:6 <b>granted</b> 45:17 <b>great</b> 19:17 77:20 137:22 <b>greater</b> 111:20 <b>grind</b> 56:18 <b>grips</b> 42:5 <b>griswold</b> 5:21 <b>ground</b> 43:9 61:16
<b>g</b>			
<b>game</b> 67:11 74:24 <b>gander</b> 42:21 <b>garavanian</b> 8:10 16:2			

[group - important]

Page 13

<b>group</b> 6:3 21:2,2 22:23 77:24 125:17 137:4 <b>groups</b> 104:13 <b>grove</b> 6:19 <b>guess</b> 20:2,9 22:11 22:19 23:15 38:13 48:2 83:6 85:12 133:23 136:4 <b>guido</b> 13:5,9 16:5 <b>gun</b> 137:25	<b>heads</b> 29:13 <b>hear</b> 14:13,14 24:4 48:24 53:21,24 57:2 76:21 136:1 <b>heard</b> 30:19 52:15 65:10 76:23 102:24 <b>hearing</b> 1:15 2:15 18:13 19:22,25 20:5 25:13,20 107:2,8 117:5,20,25 118:3,6 122:18,22,23 123:2 123:17 <b>hearings</b> 126:13 <b>heartburn</b> 29:21 <b>heavily</b> 57:5 <b>held</b> 2:15 66:4 122:20 <b>help</b> 100:1 <b>helpful</b> 38:24 62:15 137:25 <b>helps</b> 135:22 <b>hew</b> 136:5 <b>hey</b> 73:2 115:8 <b>higher</b> 36:5 <b>highest</b> 56:13 <b>highlighting</b> 70:10 <b>highly</b> 57:16,16,16 <b>hire</b> 84:2,5 86:3,5 <b>hired</b> 86:9 <b>hiring</b> 77:3 <b>history</b> 54:13 <b>hit</b> 19:12 <b>hitachi</b> 10:2 15:12 <b>hmm</b> 46:5 <b>hoag</b> 17:13 <b>hofmann</b> 5:3 <b>hogue</b> 17:13 <b>hold</b> 65:16 <b>holding</b> 131:21 <b>hole</b> 66:8 <b>hollander</b> 4:12 14:21 <b>home</b> 42:11 <b>honor</b> 14:15,17 15:6 15:19 17:24 20:10	23:3,9,19,21 25:10 26:17 27:10 29:22 29:25 30:18 31:8,16 31:24 33:18 36:2,20 38:16 47:23 49:18 50:22 51:23 52:8 53:2,8,17,18,24 56:6,24 58:11 62:10 63:20,24 65:22 68:16 69:5,24 70:22 71:18 72:16 73:18 74:17 76:25 77:3 78:1,5,22 79:10,14 82:22 83:10,22 84:24 85:14 91:10 92:15 93:7 94:3 95:25 96:6,8,24 97:8,23 98:10 99:13 99:15 101:23 102:14 103:10,11 103:12,16 104:10 104:11,16,17,24,24 108:14 109:10,24 109:24 112:18 117:10,17,18 121:16,18 122:2,14 122:17,17 123:17 123:25 125:9,14 127:8 128:22 130:6 131:12,20 132:7,9 133:9 135:3,18 137:10 <b>honored</b> 94:20,23 103:23 <b>hope</b> 101:13 <b>hoped</b> 140:4 <b>hopefully</b> 123:22 137:5 <b>horrible</b> 52:17 <b>horse</b> 51:14,15 <b>hostility</b> 43:4 <b>hours</b> 140:4,5 <b>house</b> 28:8 <b>hull</b> 9:16 17:7	<b>human</b> 78:3 <b>hundred</b> 77:5 80:14 <b>hundreds</b> 31:19,20 129:19 <b>hurdle</b> 30:9 <b>hypothetical</b> 29:4 64:7 <b>hypothetically</b> 21:9 21:11 27:24,25 30:25 101:9
<b>h</b>			<b>i</b>
<b>half</b> 15:4 30:22 31:12,21 32:7 71:2 <b>hamilton</b> 47:13 <b>hamilton's</b> 49:5 <b>hampshire</b> 50:23,24 50:25 51:6 67:7 68:5 72:7 73:8 74:9 74:21 <b>hampton</b> 10:11 <b>hand</b> 19:22 39:25 56:4 103:21 131:2 <b>hands</b> 122:15 <b>handwriting</b> 136:14 <b>hanover</b> 42:18 <b>happen</b> 81:25 108:5 111:21 116:25 120:11 121:6 133:7 <b>happened</b> 62:23 72:12 73:8,9 74:8 115:6 117:24 <b>happening</b> 50:12 89:1 <b>happens</b> 98:23,24 <b>happy</b> 27:18 <b>hard</b> 68:23 77:7 78:10,12,16 80:6 <b>harrop</b> 94:18 <b>harry</b> 8:10 <b>he'll</b> 105:13 <b>head</b> 96:12 <b>headed</b> 28:11			<b>icebreaker</b> 124:6 <b>idea</b> 23:7 40:17 42:5 60:7 78:20 108:8 109:6 116:3 124:5 <b>identified</b> 130:13 <b>identify</b> 14:6 29:11 105:16 135:4 <b>ignore</b> 89:2 96:3 <b>ignored</b> 68:5 <b>ignores</b> 87:1 <b>illinois</b> 42:15,16,25 43:12,14,15,16,21 45:19 46:2,3,25 47:8 63:25 64:9,11 64:12,24 66:1 88:4 88:6,9,13 93:18 94:4,6,11 95:2,7 133:24 <b>illston</b> 46:13 <b>illston's</b> 47:12 <b>imagine</b> 126:3 <b>impact</b> 18:24 61:19 86:13 <b>impacted</b> 97:21 <b>implement</b> 102:1 <b>implemented</b> 27:7 106:4 111:2 <b>implementing</b> 111:13 <b>importance</b> 57:7 <b>important</b> 34:21 37:5 40:2 53:23 54:3 55:24 59:17

60:17,22 61:13,24 75:3,3,4 103:1,2 126:11 128:23 <b>importantly</b> 104:22 <b>imposes</b> 106:11 <b>impossible</b> 41:9 <b>impression</b> 80:25 81:2 <b>impressions</b> 80:9,14 80:17,19 <b>improbable</b> 57:16 <b>improper</b> 105:9 <b>inappropriate</b> 34:7 <b>includable</b> 122:9 <b>include</b> 31:23 88:6 <b>includes</b> 80:7 88:4,8 88:12,16 89:6,10 96:7,8 108:19,20 <b>including</b> 31:17 67:15 <b>income</b> 77:24 <b>inconsistencies</b> 134:22 <b>inconsistency</b> 90:2 91:21 92:3,6 94:16 <b>inconsistent</b> 87:10 <b>incorporated</b> 87:9 <b>incorrect</b> 95:13,14 <b>increase</b> 115:11 <b>incredibly</b> 119:25 <b>independent</b> 22:14 77:3 82:23 83:23 84:2,5,22 85:1,5,21 86:6 130:15 131:25 <b>indiana</b> 11:14 <b>indianapolis</b> 11:14 <b>indicated</b> 50:10 85:23 117:18 <b>indirect</b> 3:10 14:9 14:16 15:2 16:17,20 26:22 27:3 38:18 43:4 51:9 53:14 55:17 99:17,21 101:20,21 110:1,10 126:24 132:13	<b>individual</b> 35:1,19 42:1 57:19 77:21,25 <b>individuals</b> 78:3 79:6 109:6 <b>industry</b> 106:25 <b>inflated</b> 41:15 42:8 <b>inform</b> 25:21 <b>information</b> 34:23 38:20,23 39:2 40:15 49:16 79:16,20 81:18 82:16 83:5 120:22 130:17 131:25 136:18 138:12 <b>informed</b> 54:13 <b>informs</b> 111:14 <b>inherent</b> 43:24 <b>initially</b> 85:23 116:14 119:2 <b>injunctive</b> 61:25 62:3,6,19 63:13 100:2 <b>injured</b> 41:18 <b>inquiry</b> 23:16 <b>insert</b> 100:3 <b>insisted</b> 58:20 <b>instance</b> 115:21 <b>instances</b> 114:24 <b>instantly</b> 52:22 <b>institution</b> 73:22 <b>insufficient</b> 103:14 <b>intelligent</b> 123:22 <b>intend</b> 16:6 82:1 <b>intention</b> 20:15 126:10 <b>interest</b> 19:11 24:10 30:2 97:10 119:19 130:16 <b>interested</b> 25:19 141:16 <b>interesting</b> 65:23 79:3,8,17 <b>interests</b> 20:7 21:4 28:23 67:15	<b>intermeddler</b> 126:17 <b>internet</b> 54:20 78:15 <b>interplay</b> 110:16 <b>interrupt</b> 30:25 44:19 <b>interruption</b> 113:10 <b>invaluable</b> 124:6,9 <b>invective</b> 73:8 75:12 <b>invectives</b> 75:8 <b>investigation</b> 71:1 <b>invitation</b> 69:21 <b>involved</b> 51:3 67:5 95:11 <b>ipp</b> 121:19 132:18 139:7 <b>ipps</b> 7:3 8:2 14:19 14:23 15:20,22,23 16:22,24 17:1,3 18:1,3 110:20 <b>issuance</b> 70:3 <b>issue</b> 18:14,14,19 19:1,5,8 20:9 21:10 22:9 24:18 26:3,12 26:15 30:20 31:4 39:16 48:3 49:25 51:20 57:15 62:7,7 62:8 66:22,24 70:1 76:11,12,15,24 79:2 79:17,21 82:2 86:12 91:3,7 93:21 96:15 97:11 98:14 106:19 107:14 108:6 109:1 110:23 112:15 113:19,21 114:9,10 114:23 117:2,19 126:11 130:6 131:9 135:15 <b>issues</b> 18:14,16,18 19:6,10 20:4 21:8 22:16 24:1,10 30:7 30:14 31:15 33:3,11 35:5,10 52:11 56:22 56:24 58:3,4 63:23 67:10 76:8,13 79:12	79:25 91:2 93:7 102:16 107:14 108:19 110:14 113:17 118:21 119:8 121:19 123:2 133:2,25 135:23 <b>issuing</b> 18:21 106:7 112:2 <b>items</b> 19:12
<b>j</b>			
<b>j</b> 4:20 8:4 11:21 <b>j.scott.stjohn.public</b> 8:25 <b>jams</b> 2:16 3:3 49:19 119:15 <b>janet</b> 34:25 36:3 <b>january</b> 1:17 2:19 14:1 20:5 96:22 117:4 <b>jckress</b> 9:9 <b>jdc</b> 7:11 <b>jennie</b> 6:11,15 18:2 <b>jg</b> 4:17 <b>joe</b> 14:21 <b>john</b> 7:7 8:19,20,21 9:3,5 10:21 15:24 15:24,25 16:25 17:16,18,18,22 18:5 97:20 98:3 121:17 121:18,22 122:2,5 122:14 123:25 124:4 125:2,5,9,11 131:19,20 <b>john.taladay</b> 10:25 <b>joinder</b> 25:2,3 <b>joined</b> 131:14 <b>joint</b> 100:23 <b>jones</b> 41:19 <b>josef</b> 7:5 15:4 <b>joseph</b> 4:13 8:20,21 15:24 139:7 <b>jotted</b> 18:17 <b>journal</b> 55:5			

[jr - left]

Page 15

<b>jr</b> 4:20 <b>judge</b> 21:11 23:4,24 24:13,15 25:17,19 34:12 46:13 47:11 47:12,13,13 48:24 49:2,5 60:20 69:9 69:12 73:1,4 93:21 93:21,24 94:1,25 107:3 117:1,18 <b>judges</b> 41:10 <b>judgment</b> 26:23 38:6 41:1 66:12 88:12 90:23 91:7,10 91:16 92:12,16 93:23 96:6 133:5 134:25 <b>judgments</b> 137:14 <b>judicial</b> 121:22 124:2,15 <b>jumping</b> 52:15 <b>june</b> 118:9 <b>jurisdictional</b> 130:6 <b>jurisdictions</b> 32:20 32:23 139:20,23 <b>jurisprudence</b> 44:16 <b>justice</b> 12:12 56:3 56:12 58:9	58:17 80:15 84:21 102:11 134:5 <b>kinds</b> 57:22 100:15 110:14 118:10 126:12 <b>kirby</b> 4:19 16:19 <b>kirkham</b> 7:4,6 15:1 15:1,2 17:1 25:1 39:25 40:1 43:10,13 43:18 44:24 45:2,6 45:11,13 47:10,21 47:23 48:6,13 49:4 49:12,18,20 59:2 65:11,22 66:13,16 66:19 86:20,23 87:13,16 88:6 89:14 89:24 131:2,3,4,9 136:15 <b>kirkland</b> 10:3 15:11 <b>kirkland.com</b> 10:8 <b>kmllp.com</b> 4:24 <b>knew</b> 34:18 <b>know</b> 14:11 16:11 18:14,24 19:18 20:12,22 21:13,20 28:12 29:9 32:6,7 33:9,11 34:24 35:2 35:18 36:2,23 37:7 39:2 40:9,13 43:6 49:21 51:4,20 52:19 52:23 54:10 58:25 59:9 61:9,18 62:18 66:19,20,24 68:18 69:14,19 71:10,13 74:18 75:13,14,17 75:25 76:20 78:2,6 78:18 79:4,8 80:8 80:23,23 82:6 83:1 85:10 87:14 91:16 99:24 101:23 104:4 106:23,24 107:1,6,7 107:22 108:15 109:20 110:8 114:13 119:24 120:2,14 121:3	122:18 123:12,12 127:11 129:25 130:1,11,14 131:4 132:11 134:24 136:21 <b>knowing</b> 33:6 34:20 34:21 <b>knowledge</b> 22:16 <b>known</b> 55:12 79:21 <b>knows</b> 47:17 81:22 82:9 <b>koons</b> 10:20 15:15 15:15 <b>kress</b> 9:4,5 17:18,18 17:20,22 18:5	64:10,19 65:12,21 66:8 67:22 72:5 84:13 108:24,25 115:19 129:4,15 130:21 <b>laws</b> 44:7,8,9,11 46:23,24 <b>lawsuit</b> 62:13 105:7 <b>lawyer</b> 57:12 62:13 84:12 127:19 129:19 <b>lawyers</b> 8:3 26:22 37:20 46:2 67:12,25 70:14 71:13 74:4 83:18 129:13,20 <b>lcd</b> 34:18 35:2,8 37:7 58:16,21 59:4 59:6 66:14 70:25 71:3 112:6,8 <b>lcds</b> 31:16,20 46:13 47:12 77:19,23 112:17 113:3,7 <b>lead</b> 14:8 16:5 18:23 20:6,15 21:12 22:6 22:21,22,23 24:8,22 25:4,14 30:16 40:5 53:20 57:23 67:13 68:23 69:21,24 70:14 71:9,11,12,15 71:19 72:19 73:15 73:18 76:19 83:13 130:2,8 131:5,7 132:12 133:14 <b>leads</b> 23:6 24:9,15 <b>leapt</b> 46:16 <b>leave</b> 32:24 48:23 52:20 98:12 110:5 118:2,8 124:23 138:19 <b>leaves</b> 33:7 <b>leaving</b> 100:18 108:6 127:18 <b>lee</b> 6:11 18:2 <b>left</b> 33:25 34:1 52:17 71:24 108:19,23
<b>k</b> 6:4 <b>kag</b> 6:3 <b>kaplan</b> 4:3 14:18 16:23 79:15 <b>kathy</b> 11:12 17:8 <b>kathy.osborn</b> 11:16 <b>kayes</b> 70:5,10 <b>keep</b> 19:18 60:17 96:14 119:8,8,11 <b>kellogg</b> 110:15 <b>kern</b> 6:4 16:17,17 <b>key</b> 112:17 <b>keyspan</b> 46:12,22 47:10 <b>kind</b> 28:24 45:17 48:15,20 55:12,13		<b>l</b> 4:5 11:12 <b>lady</b> 102:24 <b>lake</b> 6:5 <b>land</b> 64:9,10 <b>lane</b> 8:22 <b>language</b> 39:6 96:19 100:3 114:9 <b>large</b> 21:2 36:7 95:14 132:24 <b>larger</b> 31:21 94:21 <b>largest</b> 132:13 <b>larimer</b> 9:12 <b>las</b> 8:6 <b>late</b> 74:24 <b>laura</b> 9:3 17:19,22 <b>lauren</b> 3:13 14:15 62:15 <b>lauren russell</b> 3:18 <b>law</b> 6:3 7:14 8:12,20 9:4,11,17 15:7 17:2 27:16 43:6 44:1,20 45:8,18,21,22 46:4 46:16,17,17,20,22 47:6,15 48:12,13 51:1 52:18,19 54:1 56:13,16,17,19 57:4 57:8,10 58:3 59:25 60:2,8 61:15 64:7,9	



[left - master]

Page 16

110:6 113:5 117:23 <b>legal</b> 28:13 <b>legge</b> 69:9,13 73:1,4 93:21,22,24 <b>legge's</b> 94:25 <b>legitimacy</b> 23:16 <b>legitimate</b> 48:3 53:12,12 <b>length</b> 19:17 <b>letter</b> 49:20 70:3 72:19 73:3 114:17 119:14 135:24 <b>lexis</b> 49:4,10,17 114:19 <b>lg</b> 52:1,3 54:16,16 54:17 132:19 133:3 133:7 <b>liability</b> 97:14 <b>life</b> 63:2 84:15 <b>light</b> 68:9 <b>limit</b> 124:11 <b>limitations</b> 54:2 58:4 <b>limited</b> 49:19 70:13 124:20 139:20 <b>line</b> 30:8 42:10,11 42:12 47:5 48:17 74:5 <b>lingered</b> 63:1 <b>list</b> 19:12 81:1 96:24 97:1 125:21 137:11 <b>listed</b> 24:18 <b>listing</b> 94:13 <b>literally</b> 103:1 <b>litigants</b> 124:23 <b>litigate</b> 33:2 <b>litigated</b> 48:7 64:14 69:2 105:22 <b>litigation</b> 1:5 2:5 19:4 55:9 97:14 124:12,15 132:18 <b>little</b> 25:14 36:13 54:8 81:23 118:8 140:13	<b>live</b> 58:9 101:19 <b>llc</b> 9:4 <b>llp</b> 3:11 4:19 5:3,12 5:19 6:10 10:3,11 10:19 11:3,11,19 12:4 <b>logged</b> 21:21 <b>logic</b> 25:24 <b>logical</b> 129:21 <b>logically</b> 30:8 <b>long</b> 8:23 66:25 68:19 81:1 107:12 110:11 133:12 <b>longer</b> 31:18 37:2 98:21 <b>look</b> 41:13,16 58:3,4 60:13 63:3 95:19,19 96:15,19 99:15 110:2 113:7 128:21 129:4 130:19 136:10,13 139:16 <b>looked</b> 34:9 69:17 114:22 <b>looking</b> 109:2 135:1 137:15 <b>looks</b> 49:8 55:21 101:14 <b>loose</b> 124:5 <b>loosely</b> 59:22,23 <b>lost</b> 60:4 69:9 <b>lot</b> 16:8 19:20,23 23:23 24:11 35:16 45:14,23 52:9 73:7 74:15 77:22 93:19 96:21 100:11,13 107:5 113:1,2 125:3 137:23 <b>louis</b> 9:7 <b>love</b> 75:20 85:10 137:21 <b>lower</b> 112:24 <b>luck</b> 42:25 <b>lumber</b> 70:6,11 <b>lump</b> 55:1	<b>lupron</b> 115:1 <b>m</b> <b>m</b> 11:20 <b>machine</b> 141:7 <b>magnitude</b> 96:16 <b>mahler</b> 6:17 17:25 <b>maintain</b> 45:8 <b>making</b> 47:24 57:1 67:24 70:14 101:22 114:2 <b>march</b> 117:1 <b>margin</b> 83:15,19 <b>mario</b> 3:12 14:8 <b>marioalioto</b> 3:17 <b>mark</b> 11:21 <b>market</b> 77:20 <b>marketing</b> 81:4 115:1 <b>marla</b> 13:12 <b>martin</b> 2:16 3:4 11:4 15:17 <b>mason</b> 5:3 <b>massachusetts</b> 50:23 51:1,6 52:18 67:6 68:4,18,20 70:21,23,25 72:7,17 72:20 138:12 <b>massive</b> 54:21 <b>master</b> 2:16 3:4 14:5 14:10,24 16:13,16 17:4,12,20,23 18:6 18:11,21 21:9 22:7 22:25 23:2,14,17 24:2,5,21,24 25:11 25:16,22 26:1 27:24 29:3,16,18 30:17,24 31:4,25 32:4 33:14 34:10 35:3,12,14 36:8,10,19,23 37:1 37:4,14,22 38:4,8 38:10,12,21 39:16 43:5,11,17 44:19,25 45:5,7,12 47:4,20 47:22 48:2,11,23	49:11,15,19,24 50:7 50:20 51:11,16,19 51:24 52:7,25 53:4 53:9 54:6 58:14 59:5,18 61:7,11,18 62:3,5,14 63:3,7,9 63:12,15,17 64:2,15 64:20 65:3,8,10,14 65:18 66:10,15,18 66:20 67:19 68:13 69:6,8,18,23 70:7 70:19 71:5,9,23,25 72:6,10,12,15 73:5 73:14,16 74:8,20 75:5,10 76:6,10 78:10,18,21 79:1,13 80:17 81:17 82:6,17 83:1,4,20 84:1,4,7 84:10,15,19 85:9,25 86:12,20 87:12 88:17,19,21 89:3,9 89:13,16,25 90:18 90:23 91:6,20 92:4 92:13,19,24 93:1,9 94:22 95:5,22 96:1 96:11,15 97:5,12,15 97:18 98:2,12,18 99:3,7,10 101:6 102:3,5,9 103:24 105:2 106:12,20 107:12,18 110:18 112:6,9,12,22 113:1 113:9 114:13,16,21 116:20 117:4,7 118:11,24 119:1,6 120:13 121:5,13,17 121:20,24 122:3,10 122:15,20,25 123:5 123:19,24 124:3,25 125:4,7,10,13 127:1 127:3,11,15,23 128:2,13,16,24 129:2,11 130:4,14 130:24 131:1,8,10 131:18 132:4,8
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**[master - name]**

Page 17

133:18,22 134:3,5 135:6,13,21 136:4 137:18,22 138:3,5,9 138:14,18,24 139:4 140:3,15,17,20 <b>master's</b> 21:16 <b>masters</b> 41:10 113:24 114:6,8 <b>material</b> 96:19 136:6,7 <b>math</b> 56:8 <b>matter</b> 23:20,23,24 23:25 30:14 94:1,17 113:19 119:25 134:10 <b>matters</b> 21:25 29:11 <b>matthew</b> 4:4 14:17 79:14 <b>maximum</b> 108:9 <b>mcinerney</b> 4:19 16:19 <b>mdl</b> 1:6 2:6 129:19 <b>mduncan</b> 4:9 <b>meadowcrest</b> 8:5 <b>mean</b> 19:14 21:9 27:25 28:10 29:17 30:25 31:10,14 53:9 54:15 78:11 80:7,18 81:24 82:7,24 83:4 83:6 92:8 94:22 96:17 97:5 106:20 119:18 122:11,11 122:22 123:6 129:21,23 134:9,13 135:7 136:2,4 137:3 137:23 <b>meaning</b> 101:20 <b>means</b> 59:24,24 80:19 <b>meant</b> 27:5 94:12 <b>meat</b> 36:24 <b>mechanism</b> 61:13 <b>meet</b> 27:20 37:5 126:21	<b>meetings</b> 31:19 <b>meets</b> 111:2 115:22 <b>member</b> 34:13 35:23 91:18 127:13 <b>member's</b> 35:19 <b>members</b> 19:2,3 20:7 41:13 42:6 43:8 70:12,14 77:10 77:25 91:12,22 <b>memorized</b> 135:1 <b>memory</b> 58:25 91:16 <b>mention</b> 55:13 66:13 91:15 <b>mentioned</b> 74:23 136:8 138:6 <b>meridian</b> 11:13 <b>merit</b> 32:11,12 <b>meritless</b> 40:20,21 41:6 <b>merits</b> 26:14 39:17 39:18 <b>met</b> 79:23 81:16 <b>mexico</b> 14:22 <b>mexio</b> 4:15 <b>mgeagan</b> 11:8 <b>michael</b> 10:12 15:13 <b>micheletti</b> 5:5 16:21 16:21 <b>michigan</b> 5:22 <b>mike</b> 29:22 68:16 <b>milberg</b> 5:19 15:23 105:15 <b>milberg.com</b> 5:24 <b>miller</b> 9:11 18:4,4 <b>million</b> 27:8 28:3 34:6 35:16 40:9 71:3 76:2 80:14 84:17,21 88:1,1,2 90:7 93:2,2 125:3 134:10 <b>mind</b> 18:15 26:15,16 28:1 43:7 51:23 63:21 79:24 86:13 96:14 99:14 123:8	<b>minimize</b> 124:17 <b>minimum</b> 119:9 <b>minute</b> 44:19 59:17 110:5 133:19 <b>minutes</b> 76:7 133:20 140:5 <b>misses</b> 77:24 <b>mission</b> 12:6 <b>mississippi</b> 8:23 <b>missouri</b> 9:7 51:5,5 51:8,11 67:9 68:5 71:1 72:8 73:9 74:9 74:12 <b>mistake</b> 52:21 98:6 119:17 <b>mm</b> 46:5 <b>mockingbird</b> 8:22 <b>modelling</b> 113:24 <b>modifications</b> 115:25 <b>moment</b> 108:8 <b>monetary</b> 39:19 43:19 44:14,21 45:9 45:17 46:11 47:2,9 50:6 58:17,23 62:9 65:25 99:25 <b>money</b> 30:4,21 31:6 31:6,10,23 32:9,13 32:16,23 33:6,10 35:9,17 48:21 75:25 77:22 87:3,19,24 88:25 89:19,22 90:5 90:9,12,16,20 91:1 91:5,8 92:1,4,5,21 93:20,22 94:12,16 95:1,9,10 96:3 100:11,13,16 101:21 108:16,18 109:13 110:3,6 112:13,15,25 113:5 113:13,15 116:8,15 116:22 132:12,15 132:17,21,23,25 133:7	<b>monitors</b> 36:4 <b>montgomery</b> 5:6 6:12 7:17 <b>months</b> 29:2 73:24 <b>moore</b> 8:12,13 16:1 16:1 25:10,11,12,18 33:17,18 34:17 35:13,15,24 36:20 36:22,25 37:3,5 50:2,8 52:8 70:20 70:21 71:6,18,24 72:2,9,11,13 73:12 73:15,16 75:15 86:17 97:2 <b>moot</b> 29:15 <b>morning</b> 14:5,8,15 14:17,20 15:1,19 113:17 <b>motion</b> 18:22 20:6 20:12,20 25:3,13,21 36:12,15 38:10,12 50:14 69:4 81:20 130:7 138:15 139:5 <b>motions</b> 68:21,23,25 <b>motivated</b> 126:5 <b>motor</b> 48:16,18 <b>motors</b> 97:13 <b>move</b> 26:2,3 76:10 76:15 102:1 117:25 118:8 <b>moved</b> 108:20 <b>mscarborough</b> 10:16 <b>mullin</b> 10:11 15:14 <b>multiple</b> 34:18 58:7 61:5,23,23 68:21 115:2 <b>multistate</b> 74:16
<b>n</b>			
<b>n</b> 3:12 9:19 11:13 <b>name</b> 14:21 24:7 97:12 128:16 141:19			

<b>named</b> 67:15 127:6 127:6,12,16 131:13 <b>nathan</b> 5:13 15:21 <b>national</b> 32:24 <b>nationwide</b> 54:16,19 55:4 66:9 67:14 84:16 <b>natural</b> 78:7 79:6 100:19 101:2,18 102:5,21 103:4,7,18 104:7,12 105:4,8,19 107:4,20 <b>ncihlar</b> 5:17 <b>near</b> 116:16 <b>necessarily</b> 69:20,21 <b>necessary</b> 21:19 69:11 106:3,5,6 <b>need</b> 24:1 33:10 37:6 39:23 42:23 52:25 69:8 76:14 105:5 114:20 116:3 130:19 136:6,8,9,24 137:1,3,12 140:13 140:13 <b>needed</b> 85:16,18 <b>needs</b> 33:20,21 76:22 <b>negotiate</b> 100:15 101:25 <b>negotiated</b> 99:20 115:5 <b>negotiation</b> 28:7 115:10 <b>neither</b> 141:15 <b>network</b> 80:12,20 80:21,24 <b>netz</b> 34:25 36:3 40:16 <b>netz's</b> 37:11 40:11 <b>nevada</b> 8:6 <b>never</b> 34:9 37:20 44:5 48:21 58:11 63:1,10 72:13 73:12 73:13 74:10 90:15 130:12	<b>new</b> 4:15 11:6,6 14:22 31:14 33:15 50:23,24,25 51:6 61:15 67:7 68:5 72:7 73:8 74:8,20 91:23 <b>newspaper</b> 54:20 <b>nice</b> 16:9,10,14 82:12 <b>nil</b> 58:11 <b>nine</b> 56:7,8,8 <b>ninth</b> 44:5,6 48:14 48:19 64:17 65:21 66:1,4 110:12,15 113:18,20 131:23 <b>nod</b> 130:10 <b>non</b> 19:2 20:7 21:2 22:4 32:25 33:8,25 39:21 40:4 44:21 45:9,13 53:14 58:18 58:23 61:8 62:21 66:24 <b>noon</b> 137:19 138:3,4 140:10,15,17 <b>normally</b> 121:6 <b>northern</b> 1:2 2:2 36:14 64:22 <b>note</b> 35:9 60:21 111:25 <b>noted</b> 26:1 84:19 140:22 <b>notice</b> 19:5 22:13,16 26:25 27:4 31:14 54:4,5,8,12,17,18,19 54:19,22 55:12,14 55:20 58:15 61:20 61:22 76:11,16,18 78:25 79:12,23 80:2 81:14,15 82:8,20 83:16,24 84:16 85:8 88:20,24 89:4,7,14 90:3,4,9,11 91:12 91:17,24,25 93:15 93:15 95:12 98:3 101:16 102:19,23	102:24 103:8,18 106:4 109:2,14,18 109:21 110:22,25 111:2,5,6,14 112:20 115:22,24 117:7 118:1 119:4 120:18 125:17,20,24,25 126:2 133:12 134:11,16,20 <b>noticed</b> 68:1 <b>notices</b> 32:18 54:16 54:24 55:2,3,7,24 56:9,12,20,25 58:7 58:8 61:5,6 77:5 78:24 102:7 118:18 <b>notifications</b> 61:23 <b>notified</b> 56:10,11 <b>novak</b> 5:20 15:23,23 79:11 105:12,14,14 106:13 107:10 110:19,20 112:8 113:11 114:15,18 114:22 <b>novo</b> 23:24 <b>nuisance</b> 60:5,6,10 60:17 67:4,5 <b>number</b> 37:8 40:11 40:11 44:22 47:25 60:22,23,24 71:10 78:3 80:9 89:21 111:25 124:21 <b>numbers</b> 62:16 136:11 <b>nw</b> 10:22 11:22	<b>objection</b> 50:18 103:25 128:12,17 129:8 <b>objections</b> 20:16,18 21:5,20 22:20,20 30:13 32:21 36:24 39:18 50:15,16 61:2 106:14 107:5,9 121:3 126:24 127:22 128:3 133:3 <b>objective</b> 138:7 <b>objectively</b> 68:10 <b>objector</b> 8:19 9:16 15:24 17:6 134:23 <b>objectors</b> 8:10 9:3 15:8 16:1 19:7 28:23 35:7 56:23 60:23,24,25 61:2,3 65:4 76:4,23 85:15 86:3,15 94:10 115:8 115:13 126:23 <b>objects</b> 105:8 <b>obligated</b> 67:14 <b>obligation</b> 130:18 131:25 <b>observation</b> 116:2 <b>observations</b> 110:21 <b>observer</b> 16:7 <b>obtained</b> 115:17 116:13 <b>obtaining</b> 112:4 <b>obvious</b> 52:8,10 109:18,20 131:5 <b>occidental</b> 131:22 <b>occurred</b> 40:13 99:18 <b>october</b> 131:24 <b>offer</b> 135:18 <b>office</b> 12:13 16:4 25:7 37:18 101:7,9 101:10 <b>officers</b> 56:17,19 57:4 <b>offices</b> 7:14 15:7 17:3
---	---	--	---

[officially - pending]

Page 19

<b>officially</b> 29:4 127:23 <b>officials</b> 56:13 <b>oh</b> 34:3 64:2 86:6 116:10 122:25 134:12 136:15 <b>okay</b> 14:10 22:7 23:14,17 24:6 29:16 30:17 31:25 33:14 34:10 35:16,17 38:21 43:18 45:5 47:4,22 48:23 49:11 49:15 52:7,25 53:2 58:14 59:20,21 61:11 62:4 63:15 64:20 65:3,10 66:10 66:18,21 67:21 68:13 69:7,23 71:5 71:9 72:10,15 73:14 74:20 75:10 76:6 78:10 79:13 82:20 83:20 85:25 87:13 87:16 88:19 89:3,9 89:16 91:20 92:14 92:19,24 100:8 101:1 102:15 107:12 108:12,15 109:1,5 110:4,18 114:18,23 118:11 119:6 125:4,10,13 127:1,12,15,23 128:2,24 130:24 131:4,10 133:18,22 138:16,20 140:16 <b>old</b> 16:15 77:10 116:21 <b>olds</b> 77:13 <b>omitted</b> 19:4 39:21 62:22 <b>once</b> 24:9 52:21 83:21 <b>ones</b> 50:24 101:15 101:24 105:5,10,21 <b>ongoing</b> 79:18 121:6	<b>oops</b> 91:25 <b>open</b> 28:24 39:11 65:5 104:6 <b>operative</b> 139:12,18 139:22 <b>opine</b> 77:4 <b>opinion</b> 83:6,7 86:2 <b>opportunity</b> 18:16 61:17 102:10 103:19 104:7 105:6 <b>oppose</b> 129:9 <b>opposed</b> 34:14 87:22 <b>opposite</b> 24:17 42:9 <b>opposition</b> 25:2 38:6 50:16 68:22 <b>oppositions</b> 25:9 <b>opt</b> 57:7 60:23 61:4 61:13,19 103:2 <b>option</b> 86:3,4 <b>oral</b> 1:15 2:15 19:25 123:13 <b>order</b> 18:17 23:21 32:2,5 33:18 38:3 38:19 42:24 49:5 93:23 94:6 95:19 119:6 120:3,6 130:2 <b>ordered</b> 137:1 <b>orders</b> 90:25 96:20 <b>oregon</b> 46:15,20,22 65:8 66:14 88:4,9 88:13 93:18 94:4,6 94:11,16 95:2,7 <b>organized</b> 119:10 <b>original</b> 36:18 50:3 50:18 118:22 141:12 <b>originally</b> 68:20 115:7 <b>osborn</b> 11:12 17:8,8 <b>ought</b> 22:14 27:7,8 60:8 <b>outlined</b> 29:25 <b>outreach</b> 80:8,14 81:1	<b>outs</b> 57:7 60:23 61:4 61:19 <b>outside</b> 43:16 111:9 <b>overcharge</b> 36:4,5,5 36:6 <b>overcharges</b> 44:4 <b>overruling</b> 42:18 <b>p</b> <b>p.a.</b> 4:12 <b>p.c.</b> 7:4 9:17 <b>p.m.</b> 2:18 133:21,21 140:22 <b>pac</b> 70:11 <b>pacific</b> 70:5 <b>package</b> 94:21 <b>page</b> 48:25 49:2 124:9 135:24 <b>pages</b> 49:5 135:25 137:4,16,17 <b>paging</b> 49:6 <b>paid</b> 30:4 31:2,6 32:10,10,11,20 50:10 80:12 87:4 89:15 90:5 94:16 95:1 132:15,20,24 132:25 <b>panasonic</b> 11:2 15:18 <b>panel</b> 34:19,20 36:22 37:6,7 40:14 <b>paper</b> 50:4 114:12 131:15 <b>papers</b> 36:18 40:10 50:4,10,17,18 52:13 54:11 62:11 69:17 74:24 75:16 81:20 103:16 105:17 120:25 121:2,4 125:18 126:7 127:5 128:11,13,14,16 <b>parens</b> 66:16 99:8 102:12 104:13 105:5,7,10,21 106:9	<b>park</b> 11:5 <b>part</b> 28:16 36:14,16 38:6 55:14 69:20 71:14 81:24 90:16 94:20 95:3 99:19 104:4,21 127:18 <b>parte</b> 119:7 120:6 <b>partial</b> 71:1 <b>participate</b> 16:7 <b>particular</b> 18:17 120:9 <b>particularly</b> 19:17 106:17 114:18 115:21 120:19 124:20 137:23 <b>parties</b> 38:19 <b>parting</b> 132:10 <b>parts</b> 107:21 <b>party</b> 97:24 141:17 <b>pass</b> 43:20,21 46:25 <b>passing</b> 55:13 <b>passthrough</b> 42:19 42:24 <b>paths</b> 104:3 <b>patience</b> 69:10 <b>patriac</b> 66:16 <b>patriae</b> 99:8 102:12 105:21 <b>patrick</b> 7:16 17:2 <b>paul</b> 5:20 15:23 105:12,14 <b>pay</b> 32:13 97:25 100:10 <b>payment</b> 60:11 92:17 95:25 108:7 <b>payments</b> 60:9 88:13 89:10,10 95:3 98:4,5 <b>peace</b> 132:17 <b>peep</b> 52:5 <b>pending</b> 18:23 59:12 59:14 63:6,8,16 103:11 105:22 106:9 139:12,19,19 139:22
--	---	---	---

<p><b>pennsylvania</b> 4:7 10:22</p> <p><b>people</b> 14:13 19:16 19:20 21:1,2 22:1,5 22:23 31:2 32:14,19 32:25 33:7 34:8 37:20 39:3 43:3,22 48:17,24 56:17,18 56:18 57:1,23,25 58:17,23 60:14 62:21 64:13 66:23 71:10,24 73:20 75:14,16 77:17 78:15 87:23 88:24 89:1 98:22 99:6 100:17,20 101:2,18 102:5,21 103:4,7,19 103:22,23 104:12 105:8 107:5,20 108:6,9,16,17,19,21 116:20 117:13 118:1 119:18 125:22 126:4</p> <p><b>percent</b> 33:10 77:7 78:11,12 84:21 115:7,9</p> <p><b>percentages</b> 92:22 95:1,21</p> <p><b>perelman</b> 4:5 16:23 16:23</p> <p><b>perfect</b> 18:12 113:7</p> <p><b>period</b> 41:14,21,24 66:7 77:11,13,18 92:20 111:20 116:10,14,21</p> <p><b>permits</b> 120:3 129:5</p> <p><b>person</b> 41:25 43:25 69:25</p> <p><b>personalize</b> 67:10</p> <p><b>personally</b> 24:12</p> <p><b>persons</b> 78:8 104:7 105:4 107:4</p> <p><b>perspective</b> 22:15 73:19 109:4 132:11</p>	<p><b>persuade</b> 100:3</p> <p><b>persuasive</b> 106:18</p> <p><b>pertains</b> 141:11</p> <p><b>petroleum</b> 131:22</p> <p><b>phase</b> 81:25</p> <p><b>philadelphia</b> 4:7 14:18</p> <p><b>philips</b> 10:18 15:16 17:17 121:23,24</p> <p><b>phone</b> 14:14 17:4 18:7 71:12 120:1</p> <p><b>phonetic</b> 94:18</p> <p><b>pickup</b> 97:14</p> <p><b>picture</b> 12:3 17:11 53:19 135:14,16 138:22</p> <p><b>pie</b> 89:8</p> <p><b>piecemeal</b> 28:25</p> <p><b>pipe</b> 129:24</p> <p><b>place</b> 23:22 97:3 141:4</p> <p><b>plaintiff</b> 42:23 48:22 64:18 65:1,7,24 66:5,6,14 74:10,12</p> <p><b>plaintiffs</b> 3:10 13:3 14:16 15:3,10 16:11 16:18,20 24:16 42:21 46:3 50:14 67:15,16,25 68:4 72:3,6,7 74:7 86:4 99:18,21,24 101:2 110:2 115:6 130:12 131:13,14</p> <p><b>plan</b> 26:13,21,24 27:3,6,6,7,11,12,17 28:5,9 29:7 30:16 39:19 86:25 87:1,8 87:8,9,10,11,23,25 89:18,19,23 103:25 104:5 108:15 109:2 109:3 110:22,25 111:2,5,14 115:7,22 115:25 133:12</p> <p><b>plate</b> 137:24</p>	<p><b>play</b> 67:11</p> <p><b>playing</b> 124:4</p> <p><b>plays</b> 103:15,17</p> <p><b>plaza</b> 4:14</p> <p><b>pleading</b> 46:3</p> <p><b>please</b> 19:18 37:14</p> <p><b>pllc</b> 8:3</p> <p><b>plodding</b> 89:4</p> <p><b>plus</b> 40:9 77:5 80:14 84:21 90:7</p> <p><b>plutzik</b> 6:17 17:25</p> <p><b>pnovak</b> 5:24</p> <p><b>point</b> 26:17 31:9 35:12,14 50:2 56:6 58:16 61:18 65:23 66:9 70:1,5,13 72:17,22 75:6,11 80:3,5 83:10 84:22 88:7 97:2 104:9,10 104:19 109:23 113:8,11,12,21 115:12 117:13,17 118:4 121:24 124:25 126:15 128:23 130:1</p> <p><b>pointed</b> 115:2 132:13</p> <p><b>pointing</b> 131:4</p> <p><b>points</b> 67:19 77:9 105:16 121:16 125:14 135:3 138:8</p> <p><b>policies</b> 44:7</p> <p><b>pooh</b> 61:17,17</p> <p><b>popular</b> 25:7</p> <p><b>population</b> 94:5,5,7</p> <p><b>position</b> 24:17 51:8 85:2 91:21 100:5 129:9</p> <p><b>positive</b> 39:12 117:12</p> <p><b>possesses</b> 106:1</p> <p><b>possessors</b> 40:22</p> <p><b>possibility</b> 85:13 117:21</p>	<p><b>possible</b> 26:7 32:22 84:18</p> <p><b>possibly</b> 42:13 57:25 58:13</p> <p><b>postdated</b> 50:24</p> <p><b>posted</b> 118:18 119:15,23</p> <p><b>posture</b> 105:19 106:11</p> <p><b>pot</b> 88:1 100:17 112:25 132:12</p> <p><b>potential</b> 89:10 109:16</p> <p><b>potentially</b> 18:24 97:21 129:19</p> <p><b>pots</b> 87:21</p> <p><b>power</b> 43:24</p> <p><b>powers</b> 24:14,15</p> <p><b>practicable</b> 81:13 82:10 90:9 115:24</p> <p><b>practical</b> 93:1 116:23 134:10,11</p> <p><b>practically</b> 99:3,4</p> <p><b>practice</b> 44:17 84:13</p> <p><b>pragmatic</b> 58:5</p> <p><b>precisely</b> 80:9 95:8 124:15,24 131:21</p> <p><b>predicate</b> 44:1 132:19</p> <p><b>prefer</b> 118:7</p> <p><b>preference</b> 108:13</p> <p><b>prejudice</b> 40:24</p> <p><b>preliminarily</b> 95:20</p> <p><b>preliminary</b> 26:5 36:12,15 55:16,19 80:1 93:23 118:6 137:14</p> <p><b>premature</b> 18:20 20:3 22:8,12 24:9 24:12</p> <p><b>preparation</b> 25:6</p> <p><b>prepare</b> 55:20</p> <p><b>prepared</b> 35:6</p> <p><b>pres</b> 101:20 107:14 107:15 108:25</p>
--	---	---	---

[pres - questions]

Page 21

<p>109:13 110:6,17 113:6,15,22 114:1,9 115:9</p> <p><b>prescott</b> 3:11</p> <p><b>present</b> 13:11 67:12</p> <p><b>presentation</b> 105:17</p> <p><b>presentations</b> 95:15</p> <p><b>presented</b> 86:8,9</p> <p><b>press</b> 74:13</p> <p><b>presumably</b> 21:23</p> <p><b>presume</b> 50:1</p> <p><b>pretty</b> 36:1 41:5 61:3 76:21 77:1</p> <p><b>prevailed</b> 69:3,12 73:1</p> <p><b>preview</b> 54:8</p> <p><b>price</b> 41:14,15,22 65:24 77:18 100:7</p> <p><b>pride</b> 27:12</p> <p><b>primary</b> 30:2 106:13,16</p> <p><b>principle</b> 133:10</p> <p><b>prior</b> 50:25 141:5</p> <p><b>private</b> 44:10,15 64:18,25 65:1,7 66:5,6,14 99:24 101:2 124:23</p> <p><b>pro</b> 87:22 89:23 95:6,10,13 107:19 133:25</p> <p><b>probably</b> 19:20 23:4 42:25 44:12 45:13 46:18 57:19 61:22 81:22 107:10 114:5 135:10</p> <p><b>problem</b> 30:15 51:14 56:22 72:23 77:8 79:17 86:15,24 86:25 87:6 88:18 93:3,6,9,10 101:4 116:7,24 126:1 130:9 133:11,15 134:14 135:4 136:14 137:5</p>	<p><b>problems</b> 16:10 27:25 28:13 76:17 95:17 98:8</p> <p><b>procedural</b> 28:13 69:1 70:1 119:8,25 120:8 130:5</p> <p><b>procedure</b> 32:14</p> <p><b>procedures</b> 41:5</p> <p><b>proceed</b> 28:13 29:20 39:7 113:14</p> <p><b>proceeding</b> 20:16,18</p> <p><b>proceedings</b> 126:10 141:3,5,7,13</p> <p><b>process</b> 27:20 40:22 41:4 73:24,25 79:18 81:24 93:8 103:2 104:4 111:3,6,15 115:23 116:4 121:8 121:9 126:21 136:20</p> <p><b>processing</b> 79:20</p> <p><b>product</b> 41:14,20 42:7 88:16</p> <p><b>products</b> 55:9 97:14</p> <p><b>professionally</b> 136:22</p> <p><b>professionals</b> 81:4</p> <p><b>proffer</b> 90:7</p> <p><b>proffered</b> 74:23</p> <p><b>program</b> 54:12 55:14 78:25 82:8 83:25 100:17 125:20</p> <p><b>programs</b> 54:21,22 111:6,8</p> <p><b>progress</b> 39:15 121:7</p> <p><b>projection</b> 108:1</p> <p><b>projections</b> 81:11</p> <p><b>promise</b> 90:16</p> <p><b>promote</b> 101:10</p> <p><b>proof</b> 43:19,21 45:18</p> <p><b>proper</b> 110:11</p>	<p><b>properly</b> 122:7,8</p> <p><b>proportionate</b> 87:20</p> <p><b>proposal</b> 28:17 117:22 118:8</p> <p><b>propose</b> 29:7</p> <p><b>proposed</b> 28:5 29:4 29:14 30:16 55:19 89:23 104:3 109:16</p> <p><b>proposing</b> 39:1</p> <p><b>propriety</b> 21:22</p> <p><b>prosecute</b> 124:21</p> <p><b>prosecuted</b> 124:19</p> <p><b>protect</b> 130:16</p> <p><b>protection</b> 51:2</p> <p><b>protective</b> 38:3,19</p> <p><b>protects</b> 61:14</p> <p><b>protocol</b> 110:12,13</p> <p><b>protocols</b> 118:17 119:4</p> <p><b>prove</b> 36:16 46:24 46:25 47:1</p> <p><b>proves</b> 43:25</p> <p><b>provide</b> 59:25 81:18 83:6 126:23 136:19 139:2</p> <p><b>provided</b> 92:17,21 93:11 96:3 108:2</p> <p><b>provides</b> 87:8,18</p> <p><b>providing</b> 138:12</p> <p><b>provision</b> 88:14 90:20 91:1,19 92:21 94:24 107:15</p> <p><b>provisions</b> 26:25</p> <p><b>public</b> 56:25</p> <p><b>publication</b> 55:5,6 114:11</p> <p><b>publications</b> 55:6</p> <p><b>pull</b> 24:23 96:23</p> <p><b>punitive</b> 67:7</p> <p><b>purchase</b> 16:11</p> <p><b>purchased</b> 41:25</p> <p><b>purchaser</b> 3:10 13:3 14:16 15:3 16:18,20 26:22 27:3 38:18 43:4 51:9 55:17</p>	<p>60:21 99:17,21 110:1 132:14</p> <p><b>purchasers</b> 14:9 16:6 39:20 42:1 53:14 54:23 55:4 126:25</p> <p><b>purchases</b> 40:12 116:13</p> <p><b>purported</b> 41:12</p> <p><b>purpose</b> 94:14</p> <p><b>purposes</b> 41:17 102:17,17 103:2,3 106:7 111:13 112:2 112:4,21</p> <p><b>pursuant</b> 117:22</p> <p><b>pursue</b> 47:8 53:15 65:1 69:21 85:23</p> <p><b>pursued</b> 71:22 72:13</p> <p><b>pushed</b> 118:5</p> <p><b>put</b> 24:7,19 26:22 29:13 42:19,21 45:15 52:13 70:24 71:7 75:2 77:14 78:7,8 84:25 85:7 90:13 103:18 132:11,17</p> <p><b>putative</b> 71:19</p> <p><b>puts</b> 104:2</p> <p><b>putting</b> 85:3</p> <tr> <td colspan="4"><b>q</b></td></tr> <tr> <td colspan="4"> <p><b>question</b> 20:11,20 22:8 23:9,10 26:5 33:13 40:19 48:1,20 53:11 59:15 60:5 61:10 64:1,4 65:5 78:7 98:5 99:5 108:4 109:9 119:3 120:17,21 122:16 127:11 133:23 134:21 136:2 137:1 139:10</p> <p><b>questions</b> 21:8 82:21 85:8 118:17</p> </td></tr>	<b>q</b>				<p><b>question</b> 20:11,20 22:8 23:9,10 26:5 33:13 40:19 48:1,20 53:11 59:15 60:5 61:10 64:1,4 65:5 78:7 98:5 99:5 108:4 109:9 119:3 120:17,21 122:16 127:11 133:23 134:21 136:2 137:1 139:10</p> <p><b>questions</b> 21:8 82:21 85:8 118:17</p>			
<b>q</b>											
<p><b>question</b> 20:11,20 22:8 23:9,10 26:5 33:13 40:19 48:1,20 53:11 59:15 60:5 61:10 64:1,4 65:5 78:7 98:5 99:5 108:4 109:9 119:3 120:17,21 122:16 127:11 133:23 134:21 136:2 137:1 139:10</p> <p><b>questions</b> 21:8 82:21 85:8 118:17</p>											



126:19 <b>quibbles</b> 133:6 <b>quibbling</b> 83:14 120:8,8 <b>quick</b> 72:17 122:16 <b>quickly</b> 87:17 117:2 117:19 135:25 <b>quinn</b> 2:16 3:4 14:20 <b>quite</b> 26:11 36:17 75:12 90:4 91:10,14 119:10 <b>quote</b> 44:14 111:5 120:24,24 <b>quoted</b> 50:18 <b>quotes</b> 91:24	<b>reached</b> 78:15 <b>reaction</b> 57:3 <b>read</b> 19:15 42:3 48:18 66:11 67:23 76:17 91:18 122:13 <b>reading</b> 122:12 <b>ready</b> 74:25 <b>real</b> 40:18 62:5 87:25 <b>realize</b> 19:15 21:25 52:11 <b>really</b> 27:25 30:13 39:17,23 40:19 42:3 52:25 53:9 54:9 55:13 57:5 81:9 86:15 96:18 101:1,3 104:2 110:2 120:2 125:5 133:14 137:24 <b>reason</b> 22:17,21 83:22,23 93:4 <b>reasonable</b> 26:10 27:6,10,11,12,21 28:3,18,21 30:6,11 53:16 59:15 83:17 83:17 <b>reasonableness</b> 18:25 26:13 <b>reasonably</b> 136:21 <b>reasons</b> 22:12 59:7 59:11 81:14 103:6 115:24 <b>recall</b> 31:16 34:15 72:17,25 138:10 <b>recast</b> 46:7 <b>receive</b> 87:24 111:23 115:8 <b>received</b> 79:19 <b>recess</b> 76:9 133:21 <b>recited</b> 91:9 93:24 <b>recites</b> 90:10 <b>recognize</b> 105:23 106:8 118:4 130:8 <b>recognized</b> 91:4	<b>recognizes</b> 111:2 <b>recommend</b> 104:24 116:24 117:18 <b>recommendation</b> 18:21 19:24 20:4 21:16 22:10 47:14 48:25 49:1,23 117:11 135:15 136:17 139:1 <b>recommendations</b> 21:20 <b>recommended</b> 103:24 117:11 <b>recommending</b> 107:3 <b>recommends</b> 131:7 <b>record</b> 33:20,23 34:16,18,24 35:9,25 36:10,11 37:12 38:2 38:5,16,17 53:3,7 61:3 68:2,14 80:3 81:14 83:12,13 85:22 96:17 101:12 101:22 107:23 127:9,19,24 138:10 138:15 139:10,14 140:1,21 141:6,9 <b>records</b> 98:10 <b>recover</b> 42:14 <b>recovered</b> 22:4 <b>recovery</b> 39:7 44:1,1 44:3,20 46:11,12 100:16 <b>redoes</b> 49:21 <b>reduce</b> 125:7 <b>reduces</b> 32:16,17 <b>refer</b> 129:16,17 <b>reference</b> 55:11 56:5 119:6 120:3,6 136:16 <b>referenced</b> 38:9 <b>references</b> 111:5 <b>referred</b> 26:20 104:5	<b>referring</b> 37:13 49:3 60:1 90:25 92:7 121:4,20 <b>refined</b> 103:9,9 109:4 <b>reflect</b> 125:8 <b>reform</b> 104:4 <b>regard</b> 21:22,24 22:2,13 40:4 51:5 67:4 95:17 120:18 120:22 <b>regarding</b> 136:8 137:13 138:12 <b>regardless</b> 132:1 <b>regards</b> 70:21 <b>regrets</b> 124:15 <b>reign</b> 51:25 <b>rejected</b> 82:25 83:1 <b>relates</b> 1:7 2:7 111:16 118:17 <b>relating</b> 19:7 <b>relationship</b> 38:24 110:22 <b>relative</b> 141:16 <b>relatively</b> 90:5 135:25 <b>release</b> 30:22 52:1,2 52:3 58:20 100:9 132:21 133:1 <b>released</b> 34:8 40:23 58:22,24 <b>releases</b> 26:25 30:5 30:20,21 31:1,7 59:6 61:21 <b>releasing</b> 19:2,3 <b>relevant</b> 72:3 136:24 137:13 <b>reliance</b> 101:25 <b>relied</b> 91:18 100:20 <b>relief</b> 23:22 43:19 44:14,21 45:9,17 47:9 48:16 50:6 58:17,23 61:25 62:3 62:7,9,20,20 63:13 99:25 100:2 101:21
<b>r</b>			
<b>r.p.c.</b> 4:3 <b>rachel</b> 12:5 17:10 <b>radcliffe</b> 67:18 <b>raise</b> 18:16 48:1 76:13 <b>raised</b> 18:19 19:6,8 19:11 20:19 34:12 35:11,13 39:18 52:4 53:10 56:23 76:14 76:18 82:2 87:5 107:14 121:19 133:3 138:8 <b>raising</b> 39:25 <b>ran</b> 70:16 <b>range</b> 35:19 36:17 <b>ranking</b> 56:13 <b>rata</b> 87:22 89:23 95:6,10,13 107:19 133:25 <b>rate</b> 34:20 39:1,2 <b>rates</b> 120:19 <b>ray</b> 1:5 2:5 <b>rbonsignore</b> 8:8 <b>rbrass</b> 12:9 <b>reach</b> 77:7 78:11 80:6 81:5,12,12 84:21 102:25			

<b>rely</b> 67:9 <b>remaining</b> 113:14 118:12 <b>remarks</b> 63:22 132:10 <b>remediated</b> 72:23 <b>remedy</b> 47:2 60:1 64:18 65:6 66:5,7 <b>remember</b> 25:6 31:16 58:21 59:21 75:5 122:11,12 <b>remind</b> 24:21 67:13 <b>reminded</b> 68:7 <b>reminding</b> 70:10 <b>reminds</b> 116:10 <b>renew</b> 16:15 <b>renfrew</b> 49:2 <b>renfrew's</b> 47:13 48:24 136:17 <b>renoticing</b> 32:21 <b>repealer</b> 19:2,3 20:7 21:2 22:4 31:22 32:25 33:8,8,25,25 39:21,21 40:4 44:21 45:9,13 51:11 53:14 58:18,23 61:8 62:21 62:22 66:24,24 76:12 <b>repeat</b> 19:16 60:19 77:2 78:8 <b>repeated</b> 39:24 40:5 <b>repeatedly</b> 52:13 67:20 <b>repeating</b> 24:20 103:17 <b>replace</b> 100:6 <b>reply</b> 24:25 34:3 50:16 64:21 68:8 <b>report</b> 18:21 19:23 20:3 21:16,20 22:9 25:20 34:25 36:8 37:11,12,22 38:14 47:14 48:24 49:1,3 49:23 56:2 82:15 117:10 121:2	135:15 136:17 139:1 <b>reported</b> 1:22 <b>reporter</b> 2:20 18:9 18:10 59:19,20 88:11 141:2 <b>reporter's</b> 14:7 <b>reporting</b> 81:25 121:7 139:17 <b>represent</b> 20:6 33:1 67:14,17 74:11 102:6 127:6,12,16 131:13 <b>representations</b> 124:14 <b>representative</b> 71:14 127:7,16 <b>representatives</b> 74:3 <b>represented</b> 75:17 75:18 124:7 <b>representing</b> 17:21 52:16 75:13 97:21 126:22 <b>request</b> 23:22 24:8 24:22 25:2,3 37:10 68:1,11 123:9,10 125:8 <b>requested</b> 141:14 <b>requests</b> 68:13 <b>require</b> 28:8 43:19 43:21 115:21 <b>required</b> 55:15 <b>requirement</b> 126:21 <b>requirements</b> 81:15 111:3,3,7,9,12 115:23 <b>research</b> 13:12 <b>resellers</b> 88:16 89:7 89:8,11,15,19 90:3 90:12,21 91:2,22 92:4,5,17 95:22,25 96:3,8,9 97:4,5 98:4 134:12 <b>residents</b> 39:20 98:21	<b>residue</b> 100:1 108:23 <b>resolve</b> 98:8 <b>resources</b> 49:19 124:21 <b>respect</b> 65:12,15 68:18 76:4 90:3 91:21 108:25 110:21 113:12 115:16 126:8 <b>respectfully</b> 78:4 <b>respond</b> 35:3 51:19 92:9 105:13 110:19 135:5 <b>responded</b> 104:21 <b>responding</b> 79:11 118:22 <b>response</b> 20:20 25:2 36:21 56:19,21 69:5 82:25 <b>responses</b> 76:19 117:8 121:3 <b>responsibilities</b> 23:5 <b>responsibility</b> 69:25 70:11 71:21 74:17 <b>responsible</b> 97:24 98:7 133:13 <b>rest</b> 124:23 <b>restitution</b> 47:3 <b>restive</b> 19:16 <b>result</b> 28:6 <b>results</b> 80:12,12 82:12 <b>retain</b> 85:18,20 <b>retained</b> 85:19 <b>retains</b> 117:14 <b>returned</b> 80:13 <b>reversed</b> 46:10 <b>reversing</b> 44:3 <b>reversionary</b> 113:3 113:4 <b>review</b> 47:6 57:9 58:3 64:7 135:3 139:23 141:13	<b>reviewed</b> 23:24 73:23 <b>reviewer</b> 86:4 <b>revise</b> 115:10 <b>revised</b> 115:18 <b>revision</b> 115:13 <b>revisit</b> 24:11 <b>richter</b> 10:11 <b>rid</b> 32:24 <b>right</b> 17:4,23 18:6,8 18:12 24:1,2 25:22 26:2,2 28:1 36:19 38:4 39:16 43:1,17 44:22 46:14,18,19 46:23 47:25 49:24 50:20,20 51:16 53:13,17 56:8 58:25 59:14 61:20 63:12 63:15,20 66:15 69:15 70:19 71:22 76:2 77:13 78:21 83:3 84:9 86:12 88:6 89:12 92:19,25 96:13 98:12 101:8 102:25 105:11 112:22 114:21 121:14 123:23 126:14 133:20 140:3,20 <b>rights</b> 21:4 39:6 57:14 93:16 <b>ripe</b> 23:25 <b>risk</b> 58:6 <b>road</b> 6:19 <b>robert</b> 4:20 8:4 15:9 24:7 <b>robust</b> 81:15 82:17 <b>rocket</b> 125:12 <b>rockhurst</b> 8:10 16:2 <b>roll</b> 107:13 <b>room</b> 66:23 71:11 <b>round</b> 135:5,8 <b>rounds</b> 68:25 135:7 136:1
--	---	---	---

<b>rule</b> 32:5 36:14 41:2 42:16,20 43:2 45:20 111:3,7 115:23 117:1,19 126:15 <b>ruled</b> 38:13 93:22 <b>rules</b> 40:23 <b>ruling</b> 41:1,2 93:24 94:1,25 123:22 <b>rulings</b> 55:25 <b>run</b> 18:12 64:11,24 65:12 66:2 75:7,8 100:16 108:18 129:22 <b>runs</b> 82:5	102:11,15 123:1 129:23 134:12 <b>says</b> 27:16 33:4 35:24 47:1,7 64:17 66:11 78:12 89:7 90:12 91:8,25 94:6 95:12 98:24,25 105:3 107:23 120:5 134:23 <b>sc</b> 1:6 2:6 <b>scarborough</b> 10:12 15:13,13 29:22,22 30:19 68:16,17 69:16,19 72:16 132:9 <b>scarpulla</b> 7:14,15 15:6,6,7 17:3 20:3 22:22 23:2,3 30:17 30:18 31:3,8 34:11 53:21 76:25,25 78:14,20,22 83:20 83:22 84:3,6,9,11 84:16,20 85:17 86:2 92:14,15,20 93:6 118:20 119:20 122:16,24 123:4,15 123:23 126:8 127:15,18 128:1,7 <b>scarpullalaw.com</b> 7:20 <b>scenes</b> 100:23,24 <b>schedule</b> 20:12,14 20:14 21:19 22:10 23:13 25:1 85:15,16 98:13 121:12 136:5 <b>scheduled</b> 23:22 <b>scheduling</b> 120:7 <b>scheme</b> 133:25 134:1,8,9 <b>science</b> 58:2,2 <b>scope</b> 52:2 55:4 <b>scrounge</b> 71:13 <b>sdi</b> 10:10 15:14 29:23 68:17	<b>seal</b> 38:17 <b>sean</b> 9:16 17:6 <b>search</b> 80:10,12,12 <b>second</b> 15:4 19:1 102:13 112:23 113:23,25 117:17 120:17 132:13 <b>seconds</b> 70:2 <b>secret</b> 55:10 <b>secretly</b> 122:20 <b>section</b> 66:7 <b>securities</b> 41:20 <b>security</b> 41:21 <b>see</b> 16:7,9,10,12,14 16:14 37:21 39:25 42:4 47:4 62:15 77:6 82:12,20 87:25 89:16 90:22 102:17 102:20 122:15,25 132:22 135:20 136:25 139:24 <b>seeing</b> 25:20 32:21 34:16 103:5 <b>seek</b> 57:18 67:17 <b>seeks</b> 67:10 <b>seen</b> 16:8 91:11 <b>sees</b> 80:22 <b>self</b> 25:25 <b>send</b> 49:18 73:2 78:24 96:23,24,25 101:16 134:19 135:19 137:11,12 <b>sending</b> 28:7 72:19 96:25 <b>sends</b> 55:22 <b>sense</b> 25:25 35:18 64:5 82:12 <b>sensitivities</b> 106:8 <b>sent</b> 56:9 91:18 118:22 119:3,18 125:24 133:12 <b>sentence</b> 126:7 <b>separate</b> 26:7,11 33:5 38:17 54:18,25 105:23 123:17	131:16 134:1 <b>separately</b> 117:2 <b>serious</b> 107:2 <b>served</b> 71:11 <b>serving</b> 25:25 <b>set</b> 20:13 27:2 44:13 94:6 98:13 99:13 108:16 110:12 118:7,20 123:13 141:4 <b>sets</b> 26:18 <b>setting</b> 94:8 <b>settle</b> 31:12 53:25 54:14 59:15 <b>settled</b> 31:17 32:15 33:13 53:19 55:18 99:7,16 115:13 136:25 <b>settlement</b> 18:22,25 19:7 21:23 22:3 26:8,10,18,20 27:14 28:2,5,22,25 29:3,5 31:21 32:6 33:12,19 34:7,15,22,23 35:8 35:22,24 37:6 39:5 40:4,10,25 41:9,17 50:3 52:2 54:10,17 55:19 58:24 70:24 71:7 79:22 86:14,16 86:16,24 87:2,2,7 87:19 88:15 89:10 90:6,7,14,17,19,20 92:16 93:5,11,14,20 94:3,19,25 95:4,18 95:20 96:2,8,20 97:6 99:19 106:8 107:16 115:4,10,14 115:18 124:5,13,18 124:22 125:1,2 126:13 129:9 131:7 131:14 132:14 133:3,4 134:7,24 137:13 <b>settlements</b> 20:22 26:17,19,24 27:2,17
<b>s</b>			
<b>s</b> 8:20,21 12:5 <b>sake</b> 108:3,8,22 <b>sales</b> 40:15 77:20 <b>salt</b> 39:9 <b>sampco1</b> 9:14 <b>samsung</b> 10:10 15:14 29:23 68:17 121:23,25 <b>san</b> 1:16 2:17 3:6,15 4:22 5:7 6:6,13 7:9 7:18 8:15 10:6,14 12:7,16 13:7 14:1 15:8 <b>sandbagged</b> 123:10 <b>sansome</b> 8:14 13:6 <b>satisfy</b> 79:7 <b>sauce</b> 42:20,21 <b>saveri</b> 13:4,4,5 16:5 16:5,14 <b>saveri.com</b> 13:9 <b>saw</b> 37:20 38:13 78:17 80:24 103:1 131:10 <b>saying</b> 29:2 32:2 41:8 43:9 44:25 46:15 48:2,17,19,21 56:15 65:23 76:22 78:14,15 86:15 89:17 90:25 94:10			

50:25 52:4 54:24,25 56:7 60:8,21 88:14 100:23 101:25 112:5 121:23 122:8 133:8 <b>settling</b> 32:7 <b>shades</b> 102:15 <b>shaking</b> 96:11 <b>shape</b> 19:24 22:4 <b>share</b> 95:13 <b>sharpen</b> 63:22 <b>shepard</b> 15:14 <b>sheppard</b> 10:11 <b>sheppardmullin.co...</b> 10:16 <b>sherman</b> 45:4 65:15 <b>shoe</b> 42:18 <b>shoreline</b> 9:19 <b>shorthand</b> 2:20 141:1,7 <b>shot</b> 102:22 103:5,7 <b>show</b> 36:16 43:2 76:5 130:22 <b>showing</b> 21:21 22:2 36:18 94:14 <b>shown</b> 81:10 <b>shows</b> 130:8 <b>side</b> 23:13,20 30:2 42:11,12 48:8 51:21 76:5,23 98:19 <b>sidelines</b> 57:13 <b>sides</b> 42:9 85:3,4 <b>signature</b> 141:22 <b>signed</b> 38:3 <b>significance</b> 84:17 <b>significant</b> 89:17 <b>silenced</b> 131:6 <b>similar</b> 51:6 54:19 114:5 <b>simple</b> 75:7,14 <b>simply</b> 45:18 64:11 73:2 87:6 111:21 <b>simultaneous</b> 137:8 137:16 140:9,19	<b>single</b> 108:7,10,12 108:17 110:23 111:23 <b>sir</b> 68:15 97:19 123:24 <b>sit</b> 63:18 <b>sits</b> 43:22 <b>sitting</b> 57:13 132:15 <b>situated</b> 35:21 <b>situation</b> 41:11 42:2 42:6,15 43:23,25 44:12 48:21 51:6 99:18 104:2 129:18 <b>six</b> 55:7 77:10 131:13 <b>size</b> 122:5 <b>skip</b> 67:22 <b>slightly</b> 83:15 <b>sloughing</b> 75:14 <b>small</b> 36:6 60:24 90:5,8,13 91:4,6,7 96:15 122:3 124:5,5 124:13,21 <b>smaller</b> 132:20 <b>smarter</b> 86:4 <b>society</b> 44:10,11 <b>solicited</b> 87:22 <b>solution</b> 97:24 105:3 106:10 134:13 <b>solutions</b> 104:23 <b>solved</b> 29:12 <b>solves</b> 135:23 <b>somebody</b> 75:2 136:8 <b>somebody's</b> 27:22 <b>soon</b> 43:20 118:6 <b>sooner</b> 81:19 <b>sorry</b> 30:24 49:9 53:22 77:16 89:3 99:1 105:9 113:3 117:3 <b>sort</b> 19:16 100:1 101:20 109:18 110:9,16 130:18 132:10 133:25	134:9 <b>sorts</b> 98:20 <b>sought</b> 93:13 <b>sound</b> 43:6 133:16 <b>sounds</b> 92:5 <b>source</b> 130:17 <b>south</b> 4:6 9:6 <b>speak</b> 14:11 53:22 80:5 83:21 129:20 130:11 <b>special</b> 2:15 3:4 14:5 14:10,24 16:13,16 17:4,12,20,23 18:6 18:11,20 21:9,15 22:7,25 23:2,14,17 24:2,5,21,24 25:11 25:16,22 26:1 27:24 29:3,16,18 30:17,24 31:4,25 32:4 33:14 34:10 35:3,12,14 36:8,10,19,23 37:1 37:4,14,22 38:4,8 38:10,12,21 39:16 41:10 43:5,11,17 44:19,25 45:5,7,12 47:4,20,22 48:2,11 48:23 49:11,15,19 49:24 50:7,20 51:11 51:16,19,24 52:7,25 53:4,9 54:6 58:14 59:5,18 61:7,11,18 62:3,5,14 63:3,7,9 63:12,15,17 64:2,15 64:20 65:3,8,10,14 65:18 66:10,15,18 66:20 67:19 68:13 69:6,8,18,23 70:7 70:19 71:5,9,23,25 72:6,10,12,15 73:5 73:14,16 74:8,20 75:5,10 76:6,10 78:10,18,21 79:1,13 80:17 81:17 82:6,17 83:1,4,20 84:1,4,7 84:10,15,19 85:9,25	86:12,20 87:12 88:17,19,21 89:3,9 89:13,16,25 90:18 90:23 91:6,20 92:4 92:13,19,24 93:1,9 94:22 95:5,22 96:1 96:11,15 97:5,12,15 97:18 98:2,12,18 99:3,7,10 101:6 102:3,5,9 103:24 105:2,4 106:12,20 107:12,18 110:18 112:6,9,12,22 113:1 113:9 114:13,16,21 116:20 117:4,7 118:11,24 119:1,6 120:13 121:5,13,17 121:20,24 122:3,10 122:15,20,25 123:5 123:19,24 124:3,25 125:4,7,10,13 127:1 127:3,11,15,23 128:2,13,16,24 129:2,11 130:4,14 130:24 131:1,8,10 131:18 132:4,8 133:18,22 134:3,5 135:6,13,21 136:4 137:18,22 138:3,5,9 138:14,18,24 139:4 140:3,15,17,20 <b>specific</b> 87:3 97:11 110:9 <b>specifically</b> 44:2 113:23 <b>specificity</b> 136:21 <b>speculative</b> 62:12 <b>speed</b> 76:21 <b>spelled</b> 26:24 <b>spend</b> 19:24 33:14 <b>split</b> 48:3,4 53:11,12 53:15 64:4,6 <b>spoke</b> 94:17 <b>spoken</b> 113:18
---	--	--	--

<b>spreading</b> 31:11,13 <b>spur</b> 126:3 <b>square</b> 66:8 <b>squarely</b> 23:21 <b>st</b> 8:19,20,21 9:7,12 15:24,24,25 97:20 98:3 121:17,18,22 122:2,5,14 123:25 124:4 125:2,5,9,11 131:19,20 <b>stack</b> 96:19 <b>stage</b> 80:1 100:22 124:12 125:11 <b>stand</b> 82:7 <b>standard</b> 79:23 81:13 83:16,17 <b>standing</b> 42:9 43:3 58:3 126:7 128:20 130:9,23,25 131:16 132:1 <b>star</b> 140:18 <b>start</b> 77:10 127:4 <b>started</b> 23:11 116:21 <b>starting</b> 26:17 137:12 <b>state</b> 12:11 22:5 40:4 42:10,11,12 44:20 45:8,14,18,20 45:21 46:4,5,15,16 46:17,19 48:11,13 51:11 56:10,14 57:21 65:8,12 67:16 71:12 75:3,4 79:7 82:2 88:3 89:22,22 92:22 95:2,2 98:25 103:15,17 110:8 141:2 <b>stated</b> 65:4 <b>statement</b> 19:11 68:10 120:20 125:16 128:10 <b>statements</b> 40:6 53:5 67:24 68:3 85:17 107:24	<b>states</b> 1:1 2:1 19:2,3 20:8 21:3 31:17,22 33:8,8,24 34:1 39:4 39:21,22 40:12,13 40:16 43:8 44:21 45:9,14 50:9 51:10 52:14,17,21 53:14 56:11 58:18,23 61:8 62:21,22 67:5 71:4 74:17 87:19 88:24 91:1 94:12,14,17 95:21 98:5 111:5 112:16 139:21 <b>statistic</b> 80:6 <b>status</b> 127:17 136:20 <b>statute</b> 54:2 58:4 67:6 75:7,8 <b>statutes</b> 51:2 <b>statutory</b> 50:23 <b>step</b> 57:17 74:18 <b>stepped</b> 73:20 <b>steve</b> 9:11 18:4 <b>sticky</b> 104:2 <b>stimulation</b> 111:4,8 <b>stood</b> 93:16 <b>straightforward</b> 91:3 <b>straus</b> 5:12,17 15:21 <b>strawn</b> 11:3 15:17 <b>streamline</b> 24:10 <b>street</b> 3:14 4:6,21 5:6 6:5,12 7:8,17 8:14 10:5 11:13,22 12:6 13:6 55:5 126:16 <b>strikes</b> 97:20 <b>strong</b> 58:22 <b>stronger</b> 52:18 <b>strongly</b> 75:23 <b>study</b> 37:12 <b>subject</b> 46:20 <b>submission</b> 111:18 135:9,11	<b>submissions</b> 135:12 <b>submit</b> 20:3 49:20 91:3 102:10 114:15 114:16 117:13 130:21 134:12 <b>submitted</b> 68:3 79:4 111:22 116:5,19 <b>submitting</b> 111:13 <b>subscribed</b> 141:18 <b>subsequent</b> 70:3 <b>substance</b> 118:16 <b>substantively</b> 120:10 <b>succeed</b> 108:21 <b>succeeded</b> 38:25 <b>successful</b> 34:14 <b>succinct</b> 19:19 <b>sufficient</b> 31:11 132:25 <b>suggest</b> 26:6 27:5 28:11 65:11 78:5 114:7 <b>suggested</b> 22:13 26:12 44:5 60:12 84:4 <b>suggesting</b> 28:10 43:13,14,16 137:5 <b>suggestion</b> 39:12 52:1 82:23 <b>suggests</b> 41:21 <b>suit</b> 74:13 105:21 <b>suite</b> 2:17 3:5 4:14 4:21 5:6,21 6:12,19 9:19 11:13 12:15 <b>sullivan</b> 42:3 <b>summarize</b> 86:8 <b>summarizing</b> 99:14 <b>summary</b> 38:6 41:1 <b>sums</b> 100:15 <b>supplant</b> 100:6 <b>supplement</b> 32:1 68:2,11,14 125:25 126:2 <b>supplemental</b> 78:24	<b>support</b> 16:16 60:2 126:24 <b>suppose</b> 119:24 <b>supposed</b> 28:4 121:9 <b>supreme</b> 42:17 43:6 51:7 <b>sure</b> 14:13 26:11 29:12 36:1,17 62:1 67:22 71:21,22 79:14 92:2,10 101:22 102:4 103:4 123:16 124:3 125:18 133:23 135:25 137:20 138:1,3 139:10,14 139:25 <b>surplus</b> 39:3 <b>surreply</b> 121:19 124:2,10 <b>survived</b> 73:25 <b>suspect</b> 135:10 <b>sustainable</b> 27:7 <b>suzanne</b> 1:23 2:19 141:22 <b>sway</b> 70:16 <b>sworn</b> 141:6 <b>sylvie</b> 6:4 16:17 <b>sylviekern</b> 6:8 <b>sync</b> 118:2 <b>system</b> 81:3  <b>t</b>  <b>t</b> 5:5 10:20 <b>table</b> 24:3 28:7 100:14 <b>tail</b> 93:2 <b>take</b> 18:14 22:7 24:17 31:5 32:14 58:4,20 59:18 73:6 76:6 95:6 101:11 121:5 129:21 133:19 <b>taken</b> 37:15 51:8 52:14 141:3
--	---	--	--

<b>takes</b> 32:23	73:16,18 76:5,8	134:20 135:2 137:2	132:16 133:17
<b>taladay</b> 10:21 17:16	79:10 86:11 88:21	137:2,3,3,7,12	140:13,14,22 141:4
17:16	97:18 127:2 131:17	138:24 139:16,24	<b>timely</b> 119:4
<b>talewsky</b> 8:11 16:2	140:1,3,21	<b>thinking</b> 52:23	<b>times</b> 34:18 39:10
<b>talk</b> 19:21 39:11,17	<b>thanks</b> 93:19	57:13 66:21	52:9 70:22 83:12
44:9 54:4,5,7	<b>thekresslawfirm.c...</b>	<b>thinks</b> 61:14	109:11 115:11,17
118:21 133:19	9:9	<b>third</b> 19:5 42:4	<b>tinkering</b> 28:9 30:15
<b>talked</b> 46:12,13 71:1	<b>theoretical</b> 85:12	54:19 97:9 117:21	<b>tmooore</b> 8:17
119:10 120:10	<b>theory</b> 44:17	<b>thirteenth</b> 11:22	<b>today</b> 19:21 35:10
123:3 133:24	<b>theresa</b> 8:12,13 16:1	<b>thomson</b> 11:10 17:9	39:10,12,13 82:15
<b>talking</b> 45:2,2,23	<b>thing</b> 32:2 34:12	<b>thoroughly</b> 96:18	118:21 123:11
46:9 66:6 102:24	37:3 49:6 78:1	<b>thought</b> 27:15 47:5	128:15 136:11
109:5 118:16 135:6	80:15 85:6 116:11	65:10 74:4 110:16	137:11 139:3,5
<b>talks</b> 44:2 46:20	129:23	112:18 119:19	<b>told</b> 32:19 52:12,13
<b>tank</b> 97:14	<b>things</b> 23:23 24:11	121:1 123:11	89:15 90:18 98:18
<b>target</b> 77:23	33:20 35:6 54:3	135:11	127:20
<b>targeted</b> 55:3 77:17	57:22 76:3 82:6	<b>thoughts</b> 25:23	<b>tomes</b> 44:8
<b>targets</b> 124:16	102:15,20 118:2,4	29:19	<b>top</b> 19:12
<b>tatp.com</b> 3:17,18	121:15	<b>thousand</b> 59:7,10	<b>toshiba</b> 11:18 17:14
<b>tee'd</b> 23:25 93:21	<b>think</b> 18:13 21:5,6	<b>three</b> 19:3 31:22	<b>total</b> 26:9 122:23
<b>tehama</b> 7:8	23:8 24:12 25:12,15	39:21 54:15,21 55:2	<b>totaling</b> 70:4
<b>telephone</b> 6:11,18	25:20,25 26:6 29:10	61:4 62:22 67:4	<b>totally</b> 85:6 122:11
9:5,11,18 10:21	29:25 30:1,19 34:12	70:2 109:11 117:8	<b>touched</b> 110:25
11:12,20,21 12:5	40:7 42:3 46:17,18	137:4 138:2 140:5	<b>track</b> 108:21
<b>televisions</b> 36:6,7	50:15 52:23,25	<b>threshold</b> 126:21	<b>tracy</b> 7:6 15:1
<b>tell</b> 73:6 81:19 83:24	53:23 54:24 58:25	132:23	<b>traded</b> 41:20
88:25 99:5 103:21	60:7,7,13,17 61:18	<b>throw</b> 28:11 59:21	<b>traditionally</b> 99:24
103:23 104:7	69:20 71:18,22 72:4	59:22	100:21
<b>tells</b> 82:12	76:20 77:1,12 78:15	<b>thrown</b> 69:3 72:24	<b>transcribed</b> 141:8
<b>ten</b> 76:7 90:7	79:16,16 81:14,22	<b>thursday</b> 136:6	<b>transcript</b> 141:9,12
<b>tend</b> 99:25	82:18 84:25 85:6	137:20,22,25 140:9	141:14
<b>tenet</b> 44:16	86:19 88:18 90:24	140:11,18	<b>transferred</b> 75:19
<b>tentatively</b> 62:6	93:12 94:2 95:11	<b>tigar</b> 21:11 23:5,24	75:24
<b>term</b> 98:6 113:4	97:23 103:18	24:13,15 34:12	<b>transparent</b> 119:12
<b>terms</b> 23:5 26:19	105:17,18 106:18	60:20 107:3 117:1	<b>treated</b> 138:21
27:1 29:5 30:4 39:4	107:6,10 109:17	117:18	<b>treatise</b> 47:17
59:22,22 83:18	111:1,9,20 114:4	<b>time</b> 19:25 25:15,16	<b>treatment</b> 91:22
86:16 87:3 94:20	115:19,25 116:17	25:17,18 33:15 52:9	98:20 105:9
<b>testifying</b> 141:6	118:13 119:13,18	55:16 64:24 75:9,21	<b>treble</b> 67:6 108:6
<b>testimony</b> 138:13	119:21 121:25	81:19 85:16,18,18	109:5 110:23
141:9	122:10 123:6,15,19	91:4 96:21 98:21	111:24 112:1,6,8
<b>texas</b> 9:20	123:20 124:20	105:23 106:10	114:2,10,24,25
<b>thank</b> 16:13 17:12	126:11 128:7,9,22	111:20 116:9,15	115:20 116:16
23:17,19 24:2 26:3	130:18 132:4,12	118:1 123:13 124:1	136:9
49:24 53:2,17 70:19	133:10,14,16	126:20 127:12	



[trebled - waive]

Page 28

<p><b>trebled</b> 109:8</p> <p><b>tremendous</b> 132:12 132:14</p> <p><b>trial</b> 8:3 34:14 35:23 37:12 99:23</p> <p><b>tried</b> 46:3 64:24 65:25 102:1 119:11</p> <p><b>trk</b> 7:12</p> <p><b>trotting</b> 82:18</p> <p><b>trouble</b> 126:2</p> <p><b>troubled</b> 62:6,7</p> <p><b>troublesome</b> 62:8</p> <p><b>troubling</b> 96:16</p> <p><b>truck</b> 97:14</p> <p><b>true</b> 52:5 65:13,16 73:3 138:8 141:9</p> <p><b>trump</b> 3:11,11</p> <p><b>try</b> 19:18 32:4 33:5 59:22 72:20 90:10 109:14 119:8 124:11,17 135:4</p> <p><b>trying</b> 22:19 46:9 76:3 88:7 92:9 99:18 108:4,20 120:15 130:9 134:13</p> <p><b>tube</b> 1:5 2:5 12:3 17:11</p> <p><b>tubes</b> 36:4,5,6</p> <p><b>tuesday</b> 1:17 2:19 14:1</p> <p><b>turn</b> 110:1</p> <p><b>turns</b> 134:14,17</p> <p><b>tv</b> 77:19</p> <p><b>tweak</b> 133:11</p> <p><b>two</b> 21:17 41:12 42:6 67:9 68:24 70:22 71:3 80:14 85:3,4 89:17,21 91:2 102:15 104:3 107:21 112:17 117:25 121:16 125:14 126:7 131:13 133:19 140:4</p>	<p><b>type</b> 52:2</p> <p><b>types</b> 106:14</p> <p><b>typical</b> 24:14</p> <hr/> <p><b>u</b></p> <hr/> <p><b>u.s.</b> 97:10</p> <p><b>ultimately</b> 62:23 68:24 103:10 117:14</p> <p><b>umm</b> 45:11</p> <p><b>un</b> 60:5</p> <p><b>uncommon</b> 124:20</p> <p><b>underlying</b> 27:1,16 28:25 30:10 54:1</p> <p><b>undersigned</b> 141:1</p> <p><b>understand</b> 22:25 53:10 69:9 76:17,18 82:7 97:6 123:7 127:5 128:18 132:4 139:14</p> <p><b>understandable</b> 133:5</p> <p><b>understanding</b> 102:1 122:12</p> <p><b>undoing</b> 44:3</p> <p><b>unearth</b> 72:1</p> <p><b>unequivocal</b> 68:3</p> <p><b>unfairly</b> 104:20</p> <p><b>unfairness</b> 134:22</p> <p><b>unforced</b> 97:22,25</p> <p><b>unforeseen</b> 107:8</p> <p><b>unfortunate</b> 107:7</p> <p><b>uniform</b> 66:8</p> <p><b>union</b> 3:14</p> <p><b>unique</b> 104:14</p> <p><b>united</b> 1:1 2:1 56:10</p> <p><b>units</b> 77:22</p> <p><b>university</b> 5:14 8:10 16:2</p> <p><b>unjust</b> 45:16,25 46:4,5,7 48:14</p> <p><b>unnamed</b> 67:16</p> <p><b>unprecedented</b> 61:22</p>	<p><b>unproven</b> 60:6 61:16</p> <p><b>unreasonable</b> 19:25</p> <p><b>unredacted</b> 38:7</p> <p><b>unshackled</b> 111:8</p> <p><b>untrue</b> 52:5</p> <p><b>updated</b> 136:20</p> <p><b>uphill</b> 58:19</p> <p><b>upshot</b> 81:8</p> <p><b>urge</b> 77:2</p> <p><b>urgent</b> 119:25</p> <p><b>urias</b> 4:12 14:22</p> <p><b>use</b> 65:6 77:9,11,15 104:15</p> <p><b>usefulness</b> 134:11</p> <p><b>uses</b> 81:5</p> <p><b>usually</b> 100:22</p> <hr/> <p><b>v</b></p> <hr/> <p><b>v</b> 131:21</p> <p><b>vacation</b> 119:16</p> <p><b>vacuum</b> 79:16</p> <p><b>valid</b> 69:14</p> <p><b>valuable</b> 48:1 71:6</p> <p><b>valuation</b> 54:9</p> <p><b>value</b> 34:4,21 35:19 40:6 53:16 109:7,11 110:7 116:15 124:11,18 125:3,5</p> <p><b>valued</b> 32:8 33:21 33:22,24 34:2,9,25 70:23 71:7</p> <p><b>valueless</b> 40:20</p> <p><b>values</b> 35:20</p> <p><b>valuing</b> 34:22</p> <p><b>varanini</b> 12:14 16:3 16:3 47:17 56:21 98:15,17 99:2,4,9 99:12 101:8,13 102:4,8,14 105:3 107:12,17,21 111:11 112:11,14 112:23 113:2 115:2 116:23 117:3,6,8 119:19</p>	<p><b>varanini's</b> 105:17 113:16</p> <p><b>various</b> 18:14 27:1,1 68:25 76:19 123:21</p> <p><b>vegas</b> 8:6</p> <p><b>vehicles</b> 48:16,18</p> <p><b>version</b> 49:22,23</p> <p><b>versus</b> 70:5,10 110:23 113:24 114:8</p> <p><b>vett</b> 74:5 80:2</p> <p><b>vetting</b> 73:24</p> <p><b>viability</b> 54:1 74:6</p> <p><b>viable</b> 56:16 57:10 59:14,23,24 60:2,11 62:1 64:5</p> <p><b>victims</b> 67:11</p> <p><b>view</b> 30:13 32:12 72:25 75:12 85:5 99:20 106:3</p> <p><b>viewed</b> 75:1</p> <p><b>vindicating</b> 44:15</p> <p><b>violation</b> 45:4,18 46:24 47:1</p> <p><b>virginia</b> 5:15</p> <p><b>vis</b> 28:2,2 29:5,5 30:10,10 105:20,20 121:22,22</p> <p><b>visited</b> 80:21</p> <p><b>vitality</b> 34:21</p> <p><b>voelbel</b> 5:3</p> <p><b>voice</b> 130:11</p> <p><b>volume</b> 79:5</p> <p><b>volunteer</b> 73:10 126:17</p> <p><b>vote</b> 101:6,8</p> <hr/> <p><b>w</b></p> <hr/> <p><b>w</b> 10:12</p> <p><b>wag</b> 93:2 97:23</p> <p><b>wait</b> 35:14,14 37:14 69:6,6,6 92:13 110:4</p> <p><b>waive</b> 39:6</p>
---	---	--	---

[waived - à]

Page 29

<b>waived</b> 115:15 <b>waiving</b> 126:10 <b>wall</b> 55:5 <b>walnut</b> 6:20 <b>want</b> 19:20,21,24 21:13,14,15,17 24:6 28:12 31:7 33:14 35:3,9 37:1 39:17 50:17,19 51:19 53:7 56:6,23 59:7,16,23 61:12 62:18 63:25 64:8 66:10 73:6 85:21 93:2,17,18 98:16 107:6 118:5 121:18 123:6,14 124:1 125:18 126:6 132:10,19 133:16 135:23 136:9 139:8 139:10,13,25 <b>wanted</b> 50:2 73:20 113:11 114:17 118:21 123:2 138:9 <b>wanting</b> 74:13 <b>wants</b> 23:7 57:12 61:15,15 97:1 123:9 <b>ward</b> 4:12 14:22 <b>wash</b> 60:13 <b>washington</b> 10:23 11:23 88:5,9,13 93:17 94:15 133:24 <b>water</b> 117:23 118:8 <b>waterfront</b> 76:15 <b>way</b> 18:12 22:4,17 23:12 28:14 29:20 32:2 41:25 42:8 45:15,25 47:16 52:24 64:13 68:19 81:9 93:4,17,18 100:21 110:3,7 119:21 121:9 133:2 <b>ways</b> 27:18,20,20 28:6,21,21 29:12 36:13 <b>we've</b> 21:20,24 22:13,16 34:18	36:23 60:25 64:16 65:21 103:6 104:16 109:16 113:13 117:23 118:16 119:10 123:2 <b>weak</b> 58:22 <b>website</b> 80:21 97:4 119:15 <b>week</b> 116:24 117:25 <b>weighs</b> 57:5 <b>welcome</b> 28:15,16 28:24 30:1 <b>went</b> 33:2 35:23 64:23 73:24 74:1 81:8 91:12 114:8 135:12 <b>westlaw</b> 49:16,22 114:20 <b>whack</b> 85:10 102:13 122:1 <b>whatsoever</b> 70:16 <b>whereof</b> 141:18 <b>whistles</b> 54:20 <b>white</b> 11:19 17:14 <b>whitecase.com</b> 11:25 <b>wide</b> 39:11 55:6 <b>wilhelmina</b> 113:24 114:8 <b>willing</b> 27:22 41:10 <b>windfall</b> 109:12,13 110:5 <b>winston</b> 11:3 15:17 <b>winston.com</b> 11:8 <b>wipes</b> 86:6 <b>wiping</b> 57:14 <b>wisdom</b> 96:12 <b>wise</b> 80:2 <b>wish</b> 77:3 78:5 <b>withdraw</b> 20:23 <b>withdrawing</b> 20:21 <b>witness</b> 87:14 134:2 141:18 <b>witnesses</b> 141:5	<b>won</b> 69:2 <b>wonderful</b> 47:5 <b>wondering</b> 138:16 138:20 <b>word</b> 120:7 <b>words</b> 20:1 120:21 122:4 124:6,7 135:10 <b>work</b> 40:1 57:25 82:9 100:21 <b>working</b> 57:24 85:15 105:12 112:16 <b>works</b> 63:9 85:1 <b>world</b> 31:20 113:8 <b>worried</b> 116:20,23 <b>worse</b> 66:12 <b>worth</b> 48:5 76:2 100:13 <b>write</b> 64:8 <b>writing</b> 68:14 <b>wrong</b> 80:7 105:11 113:4 <b>wrote</b> 120:21	<b>z</b>
			<b>zealously</b> 52:16 <b>zelle</b> 5:3 16:21 127:17,19,20 <b>zelle.com</b> 5:9,10 <b>zero</b> 30:22 32:8 40:6 47:25 48:5 53:16 58:11,12,12 <b>zucker</b> 131:21
			<b>à</b>
			<b>à</b> 28:2 29:5 30:10 105:20 121:22
		<b>x</b>	
		<b>y</b>	
		<b>yahoo.com</b> 6:8 <b>yeah</b> 23:1 53:9 59:4 92:2,7 97:5 <b>year</b> 77:13 <b>years</b> 16:8 50:11,11 50:11 55:10 58:7 61:5 64:10 74:2 77:9,10,12,15 116:16,21 134:25 <b>yell</b> 14:12 24:6 <b>yelling</b> 14:11 15:10 <b>yesterday</b> 118:18 119:3 <b>york</b> 11:6,6	

# **ATTACHMENT 2**



## Accurately Reporting Notice Results to Courts

What We've Noticed

December 2015

by Shannon Wheatman, Ph.D. and Alicia Gehring

### ABOUT WHAT WE'VE NOTICED

*What We've Noticed* is a periodic publication from Rust Consulting and Kinsella Media highlighting current trends and best practices.

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### ABOUT RUST CONSULTING AND KINSELLA MEDIA

The nation's leading class action administration and notification firms, Rust Consulting and Kinsella Media also provide companies an array of non-settlement solutions. With skills and expertise in project and data management, plain language, notice program design and implementation, contact centers, claims processing, and fund distribution, we manage unexpected crisis communications or administrative needs so you can focus on your core business functions. Our non-settlement services include data breach responses, plain language services, product recalls, and remediation programs.



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# Accurately Reporting Notice Results to Courts

## What We've Noticed

December 2015

by Shannon Wheatman, Ph.D. and Alicia Gehring

While the industry publicly debates questions of notice—direct versus media notice; the appropriate mix of print, broadcast, and online delivery; acceptable minimum notice reach—a more troublesome trend simmers beneath the surface: increasingly, false information is being reported to courts. Presumably unintentionally, unqualified notice providers are making serious errors in their affidavits and declarations. Here are two recent examples:

### Food Case

70%+ reach reported to the court.

**KM estimated the actual measured reach was 16%.**

**Incorrectly combined online and print media reach** by using two different target audiences that could not be combined. Also assumed every impression delivered online would reach a class member.

### Pharmaceutical Case

80%+ reach reported to the court.

**KM analyzed the notice program and determined the actual measured reach was 67%.**

**Errors were found in the calculation** of online media as well as the estimated reach from direct mail.

The Federal Judicial Center's Notice Checklist recommends that judges critically review a proposed notice program and ask: "Do you have unbiased evidence supporting the plan's adequacy?"<sup>1</sup> The FJC Checklist also warns judges to "[b]e careful if the notice plan was developed by a vendor who submitted a low bid and might have incentives to cut corners [in order to win the administration] or cover up any gaps in the notice program."

As noted above, the most obvious issue resulting in inaccuracies is incorrect measurement of the online notice's effectiveness. An experienced media professional relies on trusted third-party tools to correctly measure and report total reach against a correctly defined target audience, including tools to measure online delivery. Online now provides unprecedented targeting capabilities, but reporting that delivery must represent the entirety of the class that can be measured across all media: digital, print, and broadcast.

Further compounding the problem are digital challenges including ad fraud, relevancy, and transparency. Today's digital capabilities make it crucial to rely on correctly reported online reach and to be diligent in watching for incorrectly reported figures. A challenge such as ad fraud (ads being served to 'bots,' or non-human traffic) requires experienced digital professionals to closely monitor online activity. Media professionals must also closely monitor campaigns to ensure ads are delivered in relevant, trusted editorial environments and deliver what was promised.

Asking pertinent questions will help practitioners vet notice providers (or preferably, notice experts) and ensure the resulting programs are reported accurately and found acceptable to courts.

<sup>1</sup> Federal Judicial Center, Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide, available at [http://www.fjc.gov/public/pdf.nsf/lookup/Not-Check.pdf/\\$file/NotCheck.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Not-Check.pdf/$file/NotCheck.pdf), at 2.

All of this begs the question, who should be trusted as a notice expert? Many claims administrators have become “notice experts” overnight, providing courts with case citations their firm administered ... without clarifying that they did not opine to these notice programs. At a minimum, a notice expert should possess all of the following traits:

- Recognition by courts of expert status through court testimony.
- Training and/or in-depth experience in media planning and paid media measurement.
- Thorough knowledge of Rule 23 and particularly of 23(c)(2)(B) requirements for notice.
- Ability to translate complicated legal issues into accurate plain language that facilitates class member understanding of the litigation and their legal rights.
- Creation of effective print, Internet, radio, and TV notices consistent with best advertising practices.
- Understanding of direct notice deliverability issues that affect notice sufficiency, whether in email, postcard, or other mailed notice formats.
- Ability to combine direct notice reach, when known, with media reach to ascertain overall unduplicated reach of class members.

## VETTING NOTICE PROVIDERS: SAMPLE QUESTIONNAIRE

- **Is the notice provider’s CV limited to cases on which they worked on a notice program as an expert?**  
Or does it include cases administered, without rendering an opinion?
- **Who calculated the reach of the notice program?**  
If an outside vendor, find another expert because you are not relying on an outside vendor for an opinion.
- **What target audience is being used for measurement?**  
Is it different for print and online? If so, ask the notice provider how he/she can combine apples and oranges?
- **What tools or software are being used to evaluate reach and frequency?**  
Are they industry standard (GfK MRI, comScore)?
- **Does the plan provide a mix of media?**  
Some notice providers are pushing online-only plans (without any direct notice) despite the fact that 100% of class members are not online when ads are being delivered. Almost 17% of Adults 18+ have not used the Internet in the last 30 days and that number increases to 30% for Adults 50+ and 45% for Adults 65+.<sup>2</sup>
- **Does the plan include reach from a press release, search ads, or other online media where reach cannot be measured?**  
Don’t include reach from media that cannot be measured at the beginning of the notice program. If you include it as a measured reach at the end, your expert needs to detail how reach was calculated.
- **Does the plan factor out duplication?**  
*E.g.*, 50% reach online + 30% reach direct mail does not equal 80%. (It equals 65% because of duplication.)
- **How was the reach of Internet components calculated?**  
Notice providers must rely on trusted measurement tools such as Comscore, the leading Internet analytics company and the standard tool for measuring online media reach. A plan should reference which online measurement software was used in reach calculations to ensure best practices are used.

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<sup>2</sup> GfK MRI 2015 Doublebase.